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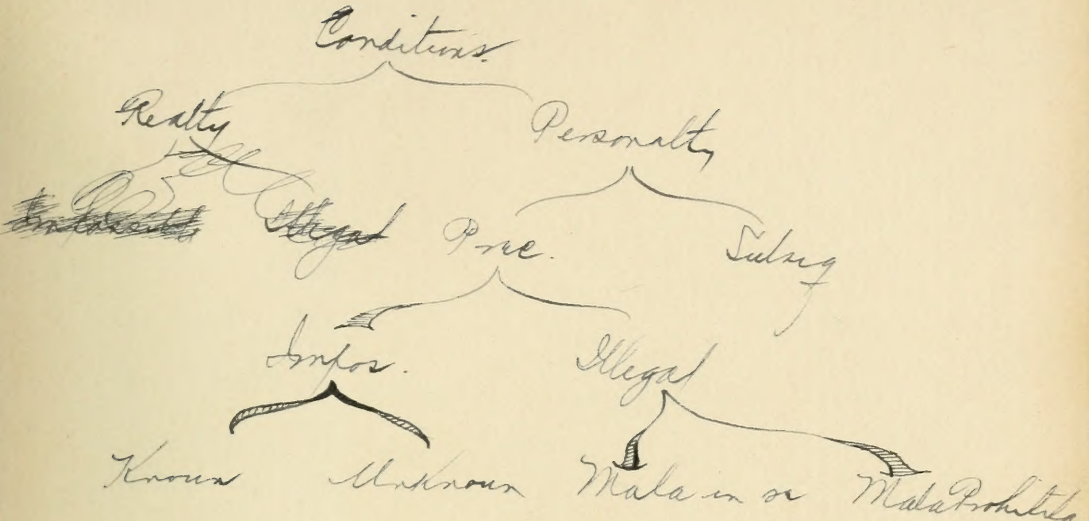
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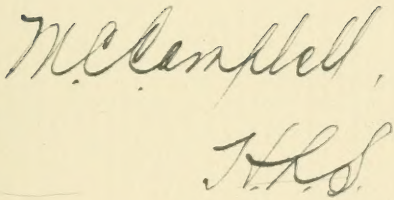

SELECT CASES

AND

OTHER AUTHORITIES

ON THE

LAW OF PROPERTY.

SELECT CASES

AND

OTHER AUTHORITIES

ON THE

LAW OF PROPERTY.

BY

JOHN CHIPMAN GRAY,

ROYALL PROFESSOR OF LAW IN HARVARD UNIVERSITY.

VOLUME VI.

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SELECT CASES

AND OTHER

AUTHORITIES ON THE LAW OF PROPERTY.

BOOK IX.

ILLEGAL CONDITIONS AND RESTRAINTS.

CHAPTER I.

ILLEGAL AND IMPOSSIBLE CONDITIONS.

Co. Lit. 206 a. If a condition annexed to lands be possible at the making of the condition, and become impossible by the act of God, yet the state of the feoffee, &c. shall not be avoided. As if a man maketh a feoffment in fee upon condition, that the feoffor shall within one year go to the city of Paris about the affairs of the feoffee, and presently after the feoffor dieth, so as it is impossible by the act of God that the condition should be performed, yet the estate of the feoffee is become absolute; for though the condition be subsequent to the state, yet there is a precedency before the re-entry, viz. the performance of the condition. And if the land should by construction of law be taken from the feoffee, this should work a damage to the feoffee, for that the condition is not performed which was made for his benefit. And it appeareth by Littleton, that it must not be to the damage of the feoffee; and so it is if the feoffor shall appear in such a court the next term, and before the day the feoffor dieth, the estate of the feoffee is absolute. But if a man be bound by recognizance or bond with condition that he shall appear the next term in such a court, and before the day the conusee or obligor dieth, the recognizance or obligation is saved; and the reason of the diversity is, because the state of the land is executed and settled in the feoffee, and cannot be redeemed back again but by matter subsequent, viz. the performance of the condition. But the bond or recognizance is a thing in action, and executory, whereof no advantage can be taken until there be a default in the obligor; and therefore in all cases where a condition of a bond, recognizance, &c. is possible at the time of the making of the condition, and before the same

can be performed, the condition becomes impossible by the act of God, or of the law, or of the obligee, &c. there the obligation, &c. is saved. But if the condition of a bond, &c. be impossible at the time of the making of the condition, the obligation, &c. is single. And so it is in case of a feoffment in fee with a condition subsequent that is impossible, the state of the feoffee is absolute; but if the condition precedent be impossible, no state or interest shall grow thereupon. And to illustrate these by examples you shall understand. If a man be bound in an obligation, &c. with condition that if the obligor do go from the church of St. Peter in Westminster to the church of St. Peter in Rome within three hours, that then the obligation shall be void. The condition is void and impossible, and the obligation standeth good.

And so it is if a feoffment be made upon condition that the feoffee shall go as is aforesaid, the state of the feoffee is absolute, and the condition impossible and void.

If a man make a lease for life upon condition that if the lessee go to Rome, as is aforesaid, that then he shall have a fee, the condition precedent is impossible and void, and therefore no fee simple can grow to the lessee.

If a man make a feoffment in fee upon condition that the feoffee shall re-enfeoff him before such a day, and before the day the feoffor disseise the feoffee, and hold him out by force until the day be past, the state of the feoffee is absolute, for "the feoffor is the cause wherefore the condition cannot be performed, and therefore shall never take advantage for non-performance thereof." And so it is if A. be bound to B. that I. S. shall marry Jane G. before such a day, and before the day B. marry with Jane, he shall never take advantage of the bond, for that he himself is the mean that the condition could not be performed. And this is regularly true in all cases.

But it is commonly holden that if the condition of a bond, &c. be against law, that the bond itself is void.

But herein the law distinguisheth between a condition against law for the doing of any act that is *malum in se*, and a condition against law (that concerneth not anything that is *malum in se*) but therefore is against law, because it is either repugnant to the state, or against some maxim or rule in law. And therefore the common opinion is to be understood of conditions against law for the doing of some act that is *malum in se*, and yet therein also the law distinguisheth. As if a man be bound upon condition that he shall kill I. S. the bond is void.

But if a man make a feoffment upon condition that the feoffee shall kill I. S. the estate is absolute, and the condition void.

If a man make a feoffment in fee upon condition that he shall not alien, this condition is repugnant and against law, and the state of the feoffee is absolute (whereof more shall be said in his proper place). But if the feoffee be bound in a bond, that the feoffee or his heirs shall not alien, this is good, for he may notwithstanding alien if he will forfeit his bond that he himself hath made.

So it is if a man make a feoffment in fee upon condition that the feoffee shall not take the profits of the land, this condition is repugnant and against law, and the state is absolute.

But a bond with a condition that the feoffee shall not take the profits is good. If a man be bound with a condition to enfeoff his wife, the condition is void and against law, because it is against the maxim in law, and yet the bond is good; but if he be bound to pay his wife money, that is good. *Et sic de similibus*, whereof there be plentiful authorities in our books.

THOMAS *v.* HOWELL.

KING'S BENCH. 1692.

[*Reported* 1 *Salk.* 170.]

ONE devised to his eldest daughter, upon condition she should marry his nephew on or before she attained the age of twenty-one. The nephew died young, and the daughter never refused, and indeed never was required to marry him. After the death of the nephew, the daughter, being about seventeen, married J. S. And it was adjudged in C. B. that the condition was not broken, being become impossible by the act of God; and the judgment was afterwards affirmed in error in B. R.

LOWTHER *v.* CAVENDISH.

CHANCERY. 1758.

[*Reported* 1 *Ed.* 99.]

THE LORD KEEPER.[1] [SIR ROBERT HENLEY.] Upon this bill three questions have been made, which are questions of construction upon the will of old Sir James Lowther. . . . The second question, which relates to the £30,000 South Sea Annuities, depends upon another part of the will. "And whereas I did not think it proper for me to divide my estate in Cumberland, but rather to dispose of it in the manner I have done, as it is an estate that requires great application and care in those that are to have the management of it, I think it right for the said Sir William Lowther to have all the estate that the said James Lowther has in Cumberland, and that the said James Lowther should have all the estate of the said Sir William Lowther in Yorkshire. It is my will, and I do hereby give and devise £30,000 South Sea Annuities to the said James Lowther, Sir William Lowther, and Robert Harper, in trust for the said James Lowther, until such time as the said Sir William Lowther shall, by absolute and effectual conveyances, make

[1] Only the opinion, and of the opinion only that part which relates to the question of conditions, is here given.

over to and vest in the said James Lowther and his heirs all his lands, tenements, and hereditaments, at or within twenty miles of Marsk, he the said James Lowther conveying to the said Sir William Lowther all his right and title to the rent charge hereinbefore given him of £1,000 per annum for his life out of my estate at St. Bees. And it is my will, that in case, by the neglect or refusal of either of the said Sir William Lowther or James Lowther, what I have here recommended and directed is not made good and completed, within six months after the said James Lowther comes to the age of twenty-one, such one of them two, by whose neglect or refusal it shall appear not to have been completed, shall not, after that time, have any share of the said £30,000 South Sea Annuities; but the whole of the said £30,000 South Sea Annuities shall be the sole property of such one of them two who was willing and ready to have completed and made effectual what I have recommended. And, further, it is my will, that, in case what I have recommended is made good and completed by the said Sir William Lowther and James Lowther, the said £30,000 South Sea Annuities shall be equally between them; and that each shall have £15,000 of it." [Sir William Lowther died after the testator, before the exchange could be made, as the plaintiff — the James Lowther mentioned in the will, and who on the testator's death became Sir James Lowther — was still an infant.]

In the first place it is to be observed, that this is the devise of a chattel, bearing fruit to Sir James Lowther, and two trustees, upon trust for Sir James, to have the fruit *quousque*. — That is, in construction of law, a devise to him of the chattel *quousque*. — When is the devise to him to cease in point of limitation? When Sir William Lowther shall convey to Sir James his Yorkshire estate. — Till that event happens, Sir James has as great an interest in this money as if no limitation had been added to the devise; just as a man that has a qualified or conditional fee, has as great, and as ample an estate, as he that has a fee-simple, though his estate is not so perdurable, so pure, or so absolute. The same event must determine the total interest in these annuities as to Sir James, and precede the vesting of any part of them in Sir William. The event is a condition subsequent to limit one interest and a condition precedent to the accruing of the other. Is there anything subsequent in the will that controls this express intent? There seems to be no event on which the £30,000 is to be divided, but this: Sir William was to purchase the moiety of the £30,000, and the rent charge of £1,000 per annum, by exchanging the estate; but if he was willing to exchange, and Sir James refused or neglected to complete the exchange, on that event the whole was to go to Sir William. Sir James has not neglected or refused, and consequently can have forfeited nothing. The exchange becomes impossible by the act of God, and by that the qualified legacy becomes absolute. Suppose I give the dividends of my £10,000 bank stock to I. S. till I. N. returns to England, or till I. N. marries; and I. N. dies. Is not the legacy ab-

solute? There seems to me throughout the will, not to be the most distant hint of an intent in the testator to have given any part of his South Sea Annuities to Sir William Lowther, but upon his doing somewhat to merit it. It is not expressed as a *legatum benevolentiæ*, but as a *legatum coercendi causa*, which has ever been a very common method of purchasing a boon, that the testator makes an object after his death.

Legacies of this kind are given on condition, adempted on condition, and transferred on condition, in order to obtain the end of the testator. They were indeed reprobated as legacies *nomine pœnæ* by the old Roman law, but permitted when that law was corrected into purity, and have been allowed ever since. "Pœnæ quoque nomine inutiliter autea legabatur, et adimebatur, vel transferebatur. Pœnæ autem nomine legari videtur, quod coercendi hæredis causa relinquitur, quo magis aliquid faciat, aut non faciat, &c. — Sed hujusmodi scrupulositas nobis non placuit, & generaliter ea quæ relinquuntur, licet pœnæ nomine fuerint relicta, vel adempta, vel in alium translata, nihil distare a cæteris legatis constituimus, vel in dando, vel in adimendo, vel in transferendo: exceptis videlicet iis quæ impossibilia, vel legibus interdicta, aut alias probrosa. Hujusmodi enim testamentorum dispositiones valere, secta meorum temporum non patitur" (Just. Inst. lib. 2, tit. 20, *sub finem*).

The sense of this is, that by the old Roman law, if any legacy was given from an heir to a legatee upon condition, or in order to compel the heir to do, or to restrain him from doing, any particular thing, such legacy was deemed to be given *nomine pœnæ* and void. This was very irrational, for *cujus est dare, ejus est disponere.* Justinian therefore corrects the law, and says such legacies shall stand on the ground of other legacies, unless the condition be impossible, prohibited at law, or infamous. However, the best comment on this passage and species of legacies, is Mr. Swinburn (4 pt. sec. 6, fo. 229). When the condition is extreme, that is to say, either necessary or impossible, such condition hindereth not the legatary, but that he may recover the legacy; but (fo. 223) that impossibility is with this limitation. When the condition is not impossible at first, but becomes impossible afterwards, for then it is not void, but makes the disposition void. *E. g.*, the testator gives A. B. £100 if he marry his daughter; afterwards, and before the marriage, the woman dies, whereby the condition is made impossible. In this case the condition, though now impossible, is not void, but makes the disposition void.

These rules annexed to conditional legacies seem established on great authority and founded on good sense. For if I annex a condition to a legacy, impossible at the time of imposing it, the legacy can never take effect, consequently it is repugnant, as if I give A. £100 *si mare ebiberit, si cœlum digito attigerit;* but if I give a legacy upon a possible event, that is not repugnant to the nature of the gift, but only goes in restriction of the testator's benevolence; and no person has a right to impose a measure upon the testator's generosity, or to say that the condition imposed is whimsical or capricious.

The next consideration is, how are these rules applicable to the present case. Nothing can be clearer to me, than that this is a legacy *coercendi causa*. It is a mean to attain an end. Sir James recites that he did not think it proper to divide his Cumberland estate, and intended to procure a further acquisition to the proprietor of it. What are the means he uses for that purpose? He gives £30,000 South Sea Annuities to trustees, to pay the dividends to Sir James Lowther: had he stopped here, no doubt could have been entertained but that Sir James would have been entitled to this £30,000. But then he adds a conditional word *quousque* Sir William convey his Yorkshire estate; and in case such conveyance is made, the £30,000 shall be divided, and each shall have £15,000. Now the event upon which Sir William Lowther was to have the £15,000 was possible — it is become impossible. How then can he be entitled to this legacy? It is in effect no more than a description of the legatee. I give to Sir William (he having conveyed the Yorkshire estate to Sir James), £15,000.

I must therefore declare . . . that the plaintiff, Sir James Lowther, is entitled to the £30,000 South Sea Annuities, and decree, that the defendant Harper may join in a sale or transfer of the said South Sea Annuities to and for the sole and absolute benefit of the plaintiff.

The Solicitor-General, *Perrot*, *Browning*, and *Sewell*, for the plaintiff.

The Attorney-General, *Wilbraham*, and *Hoskins*, for the defendants.

There was an appeal to the House of Lords from so much of the above decree as related to the legacy of the South Sea Annuities, when the same was affirmed, 6 March, 1759, 3 Toml. P. C. 186.

BROWN *v.* PECK.

CHANCERY. 1758.

[*Reported* 1 *Ed.* 140.]

WILLIAM SPARKS, by his will, bearing date the 6th of January, 1756, devised *inter alia* to his niece Elizabeth Sparks, eight dwelling-houses, with divers remainders over, and also gave her two several legacies of £500 each. The testator gave to Charles Umphreville, who had married his niece Rebecca Sparks, five shillings and no more; because he had married his said niece without the consent of her mother, or one of her relations; and after leaving his said niece Rebecca Umphreville £15 for mourning, he directed, that if she lived with her husband, his executors should pay her £2 per month, and no more; but if she lived from him, and with her mother Sparks, then they should allow her £5 per month.

By indenture, bearing date the 24th of September, 1756, made upon the marriage of Elizabeth Sparks with the defendant Peck, the testator

settled five dwelling-houses (one of which was the same with one which he had devised to Elizabeth Sparks by his will), and the sum of £500, upon the husband and wife successively, and the issue of the marriage.

Upon a bill brought to have the will established and explained, one question was, whether the advancement by the settlement was an ademption? There was another question upon the amount of the allowance to be made to Mrs. Umphreville.

The testator had four nieces, and evidence was entered into by the plaintiffs, to show that he intended the portion to be an ademption of what was left by the will; but it amounted to nothing more than general declarations, that they should all be equally provided for.

The Solicitor-General and *Wilbraham*, for the plaintiffs.

Perrot and *Comyn* for the Umphrevilles.

The Attorney-General and *De Grey*, for the Pecks.

The Lord Keeper [Sir Robert Henley] was of opinion, that the settlement made by the testator, on his niece Elizabeth Sparks, was not an ademption or satisfaction of the devises and bequests made to her in the said will; but that she was entitled both to what she took under the settlement, and what was given to her under the will.

And upon the question whether Mrs. Umphreville was entitled to the monthly payment of £5, his Lordship declared that he was of opinion that she was; and that the condition annexed being both impossible at the time of imposing it, and *contra bonos mores*, the legacy was simple and pure. A third question, upon the consideration of the residuary clause, was decided in favor of the children of the testator's nephews and nieces living at his death.

ROUNDEL *v.* CURRER.

Chancery. 1786.

[*Reported* 2 *Bro. C. C.* 67.]

Sarah Currer, by will, dated 5th August, 1778, devised her real estates to John Richardson for life, without impeachment of waste, provided he took the name of Currer; remainder to his first and other sons, in tail male; remainder to her cousin Richard Richardson, son of her cousin Henry Richardson, in tail male; remainder to (Henry) the second son of Henry Richardson, in tail male; remainder to the right heirs of Dorothy Currer; and gave the first and other takers, powers of jointuring, and to provide portions for younger children.

After the death of the testatrix, John Richardson entered and took the name of Currer. The personal estate not being sufficient, and there being a charge, he sold a small part of the real estate for the payment of debts; and, in order to avoid the sale of more of the land, paid £5000 of the debts with his own money, and took assignments of the debts.

Henry Richardson, and Richard his son, the devisee over in tail, both died in the life-time of John Richardson Currer, by which the remainder in tail vested in Henry Richardson, the second son.

John Richardson Currer purchased additional estates, and being desirous that the two estates should go together, he made his will 10th October, 1763, reciting the will of Sarah Currer, and the other matters before stated: he devised all his own lands (excepting one estate otherwise disposed of), and also the lands devised to him by Sarah Currer, to trustees, to be by them conveyed to other trustees, to the use of Henry Richardson for life; remainder to his first and other sons in tail male; remainder to the plaintiff Roundel, and his heirs male, in tail male; remainder to the daughter or daughters of Henry Richardson; remainder to his own right heirs. The devise is upon express condition, that Henry Richardson should, within six months, suffer a recovery, and bar the remainders in Sarah Currer's will, and convey all her estates to such persons, &c., as were declared by his will as to his own estates, and no conveyance of his estates be made before Henry Richardson had suffered the recovery; and, in default of his suffering such recovery, to convey his estates to other trustees, to the use of the plaintiff Roundel for life, with remainders over; and in case Henry Richardson should comply with the terms of the will, then he was to have powers of jointuring and raising portions for daughters, if he should have no male issue, provided there shall be contained in such conveyance a proviso to compel Henry Richardson, and the husbands of any women who should come into possession, to take the name and arms of Currer, and declaring this to be a condition precedent to the vesting of the estate.

By a codicil (not having disposed of his personal estate), he gave his personal estate to Henry Richardson, on condition of his performing the conditions in his will; and, if he should refuse so to do, then he gave it to trustees to lay out in lands, to the uses declared in his will as to his own estates.

After the death of John Richardson Currer, Henry Richardson proved the will; entered, and took the name of Currer, and did various acts, which, in case of a freehold estate, would amount to an election, and made preparations for suffering the recovery, but died before the recovery was completed, without issue male; but left his wife *enciente* of a child, which proved a female.

Henry Richardson Currer was heir at law to Sarah Currer, John Richardson Currer, and Dorothy Currer, consequently his daughter was so. If Henry Richardson had performed the conditions of John Richardson Currer's will, the plaintiff Roundel was entitled for life to the possession of both his and Sarah's estate; if not, upon his death the estate-tail was spent, and the reversion to the right heir of Dorothy Currer was fallen in and went to the infant daughter.

The bill was filed by Roundel, insisting that the acts done by Henry Richardson Currer were a sufficient election to take under the will of

John Richardson Currer; and therefore praying a conveyance of both the estates under that will.

Mr. Scott, for the plaintiff, supported by *Mr. Graham* and *Mr. Lloyd*.

Mr. Solicitor-General, *Mr. Mansfield*, and *Mr. Mitford*, for the defendant, the infant daughter of Henry Richardson Currer.

Master of the Rolls. [Sir Lloyd Kenyon.] This is a case of some difficulty, and I might very well reserve the consideration of it: but I think I shall serve the interests of the parties better, by giving an immediate opinion. It arises upon the will of John Richardson Currer, made with reference to that of Sarah Currer (both which his Honor stated). The bill is brought by William Roundel, praying that the will may be carried into execution, and that Henry Richardson Currer may be declared to have elected to take under the will. The important question is, whether the reversion in fee, descended, is liable to be conveyed to William Roundel under the will. Great stress has been laid on the point of election, whether the acts of Henry are sufficient to constitute an election, and whether the daughter is bound to convey: and if I thought the question was to be decided by the point of election, I would send it to a jury; but I do not think it accurately stated when it is called a case of election. The material question is, whether Henry Richardson Currer has done all the acts he must do, in order to entitle himself to John Richardson Currer's estate. The plan was, that before he should have entitled himself to it, no conveyance should be made. The means by which it was to be effected, was, that he should suffer a recovery; and I will not say that any other conveyance would answer the intent. The testator has directed the means, and none so proper to perform the intent. In certain possible events, a fine would not have done; the estate might have been liable to specific encumbrances, which a fine would have let in; but it is not necessary to decide that. In fact, no recovery was suffered. The apology is, that there was scarcely an opportunity, and that there was no neglect: and it is argued, that if it was prevented by the act of God, it should be held as done; but there are many cases where the act is rendered impossible to be done, and yet the estate shall not vest. As an estate given to A. on condition that he shall enfeoff B. of Whiteacre, B. refuses to accept, the estate will not vest in A. Here, the estate was to be conveyed upon a certain act to be done, which amounted to a price; he was to take care, that, at all events, the estate of Sarah Currer should be so conveyed as to go to the uses of John Currer's will. It is said, nothing is left undone but the execution of the deed: but this I may venture to deny. It is said, what he has done would have amounted to a conveyance: if he had been seised of a fee-simple, it might so; but he had only an estate-tail, with a fee-expectant, and could only bar by recovery. It is said, the estate-tail being spent, is now out of the case; and that therefore it is now the same thing. I think this is not so; Henry Richardson Currer should have taken care, that, at all events, the estate

of Sarah Currer should be settled to the uses of John Richardson Currer's will. He had only a reversion: he had never such an interest as he could bind by an equitable disposition. I will not say whether it was absolutely necessary that a recovery should be suffered; but he ought, in his life-time, to have obtained such an estate as he could convey; therefore the daughter is not bound to convey Sarah Currer's estates.

As to the other two points: the estates John Richardson Currer could dispose of will go to Roundel; and the same arguments apply to the personal estate: it must therefore be laid out in land to the same uses.[1]

WREN *v.* BRADLEY.

CHANCERY. 1848.

[*Reported* 2 *De G. & S.* 49.]

THE question in this case was as to the effect of the following testamentary dispositions, so far as they regarded Mrs. Ann Jefferies Wren.

Mr. Henry Pooley, the testator, by his will, dated August 8th, 1838, directed certain moneys to be invested, upon trusts, expressed as follows: —

"And pay, apply, and dispose of the interest, dividends, and annual income in manner hereinafter mentioned (that is to say), to my wife Elizabeth Pooley, one annuity or clear yearly sum of £80 for and during the term of her natural life, by equal half-yearly payments," &c.; "and to my daughter, Ann Jefferies Wren, the wife of Abraham Wren, in case she shall be living apart from her said husband, the said Abraham Wren, and shall continue so to do during the lifetime of my said wife, an annuity of £30, by equal quarterly payments, the first of such payments to be made at the expiration of three calendar months next after my decease. And I do hereby further direct, that if at any time the said Ann Jefferies Wren shall cohabit with the said Abraham Wren, the said annuity hereinbefore given to her shall, during the time she shall so cohabit, absolutely cease and determine."

The residue of the dividends were to be accumulated during the life of the testator's wife; and after her decease the testator directed his trustees to stand possessed of the trust-fund and its accumulations, after disposing of two-thirds thereof as therein mentioned. As to the remaining one-third, "Upon trust to pay the interest, dividends, and annual produce thereof at the times and in the manner hereinbefore declared respecting the portions of my said daughters, unto my said daughter Ann Jefferies Wren, during such time as she shall continue to live apart from her said husband, the said Abraham Wren; but should

[1] See s. c. 1 Swanst. 383, note.

she at any time cohabit with the said Abraham Wren, then my will is, and I hereby direct, that during such time as she shall so cohabit with the said Abraham Wren, they and he my said trustees or trustee shall pay the same unto and equally between the said Elizabeth Bradley and Sarah Picton, if living, or if dead to their children and issue, in such shares and in the same manner as hereinbefore directed with respect to the portions already provided for them respectively by this my will; and after the decease of the said Ann Jefferies Wren, upon trust to pay and divide the said remaining one-third part or share of and in the said entire trust-fund and accumulations, unto and amongst any children which the said Ann Jefferies Wren may leave her surviving by any other husband other than the said Abraham Wren, and the issue of any such children as may be then dead at such time," &c.; "and if no such child, then the share to be divided between the other two daughters and their children, in the same way as their original shares." "And I direct the various annuities bequeathed to the said Elizabeth Bradley, Sarah Picton, and Jefferies Wren, to be paid to them for their separate use and benefit, independently and exclusively of their present or any future husband, and without being in anywise subject to debts, claims, or demands; and that the receipts of the said annuitants, notwithstanding their respective covertures, shall be good and effectual releases and discharges for the same."

And the testator declared that all attempts at anticipation should be void; and he appointed his trustees, Thomas Bradley and James Allanson Picton, the executors of his will.

At the date of the will, Mrs. Wren, and her husband mentioned in the will, were living apart; but before and at the death of the testator they were reconciled, and living together. The question was, whether, under these circumstances, they were entitled to the benefit of the above bequests.

All parties concurred in desiring the court to decide the question at this stage of the cause.

Mr. Russell and *Mr. Follett*, for Mrs. Wren, the plaintiff.

Mr. J. Bird Allen, for Mr. Wren, the plaintiff's husband.

Mr. Wigram and *Mr. Bazagette*, for the other defendants.

Jan. 21st. THE VICE-CHANCELLOR. [SIR J. L. KNIGHT BRUCE.] Assuming it to be admitted by all parties, that, at the date of the will, the husband and wife were living separate, and that at the death they were living together, my present impression is, that it will be more in accordance with authority, — I do not say with principle, — to decide in favor of the gift; but I will reconsider the question.

Jan. 26th. — The will to be construed in this case is one of personalty merely; and it is admitted on each side, that Mrs. Wren and her husband, when it was made, were not living together, but afterwards, before the testator's death, came together again, and from the time of that reconciliation to the present time have been living together, and

were therefore living together at the time of the testator's death. His widow being dead, the question is, what, or whether anything, can be claimed by Mr. and Mrs. Wren or either of them, under the will. I continue to think the point one of considerable difficulty, which, in the absence of authority, I might very possibly have decided wholly, or to some extent, against them. The authorities, however, and the principles of the civil law, which, to a certain extent at least, are allowed to influence cases of the present kind, being such as I understand them to be,[1] I think it the right conclusion upon this will to say, that neither of the bequests to Mrs. Wren is defeated or affected by the circumstance that she was at her father's death, or has since been, living with her husband. The gifts are not worded exactly in the same way. I think it, however, impossible to read the will without perceiving that the testator's wish and object were to obstruct a reconciliation, and prevent the wife from living with her husband; and that, by that wish, by that object, its provisions as to her were influenced and directed. The weight of authority, therefore, as I have said, and the principles of the civil law, as far as I consider them applicable, seem to me to render a decision of this case in Mrs. Wren's favor consistent at once with technical equity and moral justice.

PRIESTLEY *v.* HOLGATE.

CHANCERY. 1857.

[*Reported* 3 *K. & J.* 286.]

JOSEPH PRIESTLEY, by his will, dated in 1850, gave and bequeathed to James Priestley the sum of £19 19*s.*; and also a further legacy of £2000.

The testator made a codicil, dated in 1852, as follows: "Whereas, since the making of my will, James Priestley, to whom I had bequeathed £2000, has emigrated to Australia, I therefore hereby revoke that legacy, and in lieu thereof I give and bequeath to him the said James Priestley, in case he remains in Australia or out of this kingdom, £600, to be paid to him twelve months after the decease of my wife; but if he return to England before her decease, I give and bequeath to him the further sum of £400 (making £1000). This last £400 not to be paid till twelve months after the decease of my wife."

In November, 1852, the testator died. Sarah Priestley, his widow, died in January, 1856.

At the time of the decease of the testator, James Priestley was at Melbourne, in Australia, whither he had gone in the year 1852.

[1] Dig. Lib. 30, T. 54. Turpia legata, quæ denotandi magis legatarii gratia scribuntur, odio scribentis pro non scriptis habentur.

Si Titiæ legatum relictum est, si arbitratu Seii nupsisset, et vivo testatore, Seius decessisset, et ea nupsisset: legatum ei deberi. — REP.

On the 9th day of August, 1853, he sailed in a British ship named the Madagascar from Melbourne on the homeward voyage to England, and upon the voyage the Madagascar was totally lost, and all her crew and passengers perished at sea.

The plaintiff was his administratrix, and filed the bill in this suit to recover the said legacies of £19 19*s.* and £600 and £400.

Mr. Prendergast, for the plaintiff.

Mr. Cairns, Q. C., and *Mr. Fischer*, for the defendants.

Judgment reserved.

Vice-Chancellor Sir W. Page Wood. I delayed giving my judgment in this case, in the hope of finding something to enable me to decide in favor of the plaintiff's claim to the additional legacy of £400. (His Honor stated the effect of the will and codicil and continued) — At the time of making this codicil, James Priestley was in Australia. It is proved that he embarked to return to England, but the ship in which he sailed foundered at sea, and all on board perished. The condition on which the legacy was given is personal to the legatee, and the legacy cannot take effect unless that inchoate return fulfils the terms of the condition. I was desirous to adopt that construction, if possible; but I do not think that the words of the condition, which are very precise, "if he return to England before her decease," can be satisfied by his embarking on a voyage to this country, in which he perished at sea.

If the codicil had contained a recital, that, owing to the testator's displeasure with James Priestley on account of his departure to Australia, he attached this condition to the legacy as a penalty, possibly the inchoate return might have satisfied the condition; but it may be, that the reason for the condition was, that the testator thought, that, while away from England, James Priestley did not require so large a provision as he would if residing in this country. I must, therefore, decide against the plaintiff's claim as to the £400.

Note. — Cf. *Boyce* v. *Boyce*, 16 Sim. 476 (1849), and 1 Roper on Legacies (4th ed.), 754–757.

On the Roman Law, see 1 Windscheid, Pandektenrecht (4th ed.), § 94, p. 266; 3 Savigny, System des heutigen Romischen Rechts, §§ 121–124; and cf. Swinb. Wills, pt. 4, § 6.

IN RE MOORE.

Chancery Division and Court of Appeal. 1887, 1888.

[*Reported* 39 *Ch. Div.* 116.]

John Moore, who died on the 17th of April, 1885, by his will dated the 2d of April, 1885, after appointing one Trafford his trustee, and appointing a guardian of his infant son, John William Moore, pro-

ceeded as follows: "I give and bequeath to my trustee all property of which I am possessed or entitled to, or over which I have any disposing power, upon trust (after payment thereout of my debts, funeral and testamentary expenses) to pay to my sister Mary Maconochie during such time as she may live apart from her husband, before my son attains the age of twenty-one years, the sum of £2 10*s.* per week for her maintenance whilst so living apart from her husband: and upon trust as to one moiety of my said trust estate to pay the same to my said son on his attaining the age of twenty-one years; and as to the other moiety thereof upon trust to pay the same to my said son on his attaining the age of twenty-five years," with a gift over on the death of his said son under the age of twenty-five years.

Mary Maconochie and her husband were married in 1866, and they had never lived apart until the latter part of 1886, more than a year after the death of the testator, when they ceased to live together. The testator was well aware, at the date of his will, that they were living together, but he had quarrelled with the husband and had not been for several years on speaking terms with him.

The testator's son survived him and was still an infant.

This was an originating summons taken out by the trustee of the will against Mrs. Maconochie for the decision of the question whether she was entitled to payment of the legacy of £2 10*s.* per week, discharged from the restriction imposed by the testator.

Upon the summons coming on in chambers, his Lordship directed it to be adjourned into court for argument; that a guardian *ad litem* should be appointed to the testator's infant son, and that the infant should be separately represented.

The summons was heard before Mr. Justice Kay on the 7th of December, 1887.

G. Williamson, for the plaintiff.

Marten, Q. C., and *Whitehouse*, for the defendant, Mrs. Maconochie.

Methold, for the testator's infant son.

1887, *Dec.* 14. KAY, J. (after reading the bequest and stating the facts, continued): —

Before applying rules of law to a provision of this kind it is proper to determine, independently of any such rule, what is the construction of this bequest.

Independently of any rule of law or decided case, the construction of the words which I have read is indisputable. It is a gift of a fixed sum every week during a certain period. To that period there are two limits: it is not to extend in any case beyond the joint lives of the husband and wife and the time when the testator's son attains twenty-one; but the payments are only to be made during such part of that period as Mary Maconochie may be living apart from her husband, and for her maintenance while so living apart. As matter of construction it is impossible to hold that any of these payments are given to her while living with her husband. The living apart from her husband is of

the essence of the gift in this sense — that it is the measure of the duration of these payments.

It has been argued that it must be treated as a legacy given upon a condition precedent, which, being against the policy of the law, must be rejected, leaving the legacy free from condition. If it be treated as a gift of an indefinite number of weekly payments of £2 10*s*., there being a condition attached to each that in the week for which it is payable the legatee should be living apart from her husband, if the condition be rejected, it must fail because the number of payments is undefined.

In other words, if it be a gift of so many sums of £2 10*s*. as there should be weeks in which the legatee was living apart from her husband, then, if you strike out the words "living apart, &c.," there are no means of computing how many such payments should be made.

The duration of these payments is a limitation, not a condition; and to give them any longer or other duration than that prescribed by the will cannot be done by treating them like a legacy of a sum of money given subject to a condition which may be discharged. To treat this gift in that manner would be making an entirely new and essentially different bequest.

It may be said, "You do, in effect, make a different bequest when you reject a precedent condition and establish the legacy discharged from it." That is so. It is doing great violence to the will. In cases of real estate the common law of England will not permit such a construction: and this rule, adopted from the civil law, ought not to be extended. By rejecting a precedent condition upon which a simple legacy of a sum of money is bequeathed, the amount of the legacy is not altered. But in this case the argument requires that an annuity given during one period should be altered into an annuity for another and wholly different period.

This is, for the present purpose, the essential difference between a condition and a limitation.

If the gift were during the joint lives of the husband and wife until the son attained twenty-one, with a condition defeating it if the husband and wife lived together, it might be necessary to reject the condition and maintain the gift; but I think it impossible to construe the will in that way.

Suppose it were a legacy of a sum computed by the number of illegal acts committed by the legatee, at £2 10*s*. for each — obviously such a legacy must fail if you reject the mode of computing it.

Then, suppose it to be £2 10*s*. for every week in which the legatee should commit an illegal act — if the limitation be rejected the computation would be equally impossible; and I am not aware of any rule of construction or rule of law which would justify the court in treating such a gift as a life annuity.

The argument in its most plausible form is that from the nature of the gift there are two limits contemplated, and if you take one away the other only is left, and therefore, in this case, the gift should be

read as though it were of £2 10*s.* a week during the joint lives of the husband and wife, until the son attains twenty-one.

But what authority is there for thus removing an essential limit? There is none, unless it can come under the law as to conditions, or, what is in some cases equivalent, conditional limitations defeating an interest previously given. But before this law can be applied it must be determined, as matter of construction, whether the gift is of that nature.

In my opinion, the true construction of this bequest is that it is a limitation of weekly payments during a specified time, and that it is not a legacy subject to a condition either precedent or subsequent. The object of the limitation being obviously to induce the person in whose favor it is made to live apart from her husband, the whole limitation may possibly be void; but if the event has not happened, the trust has not arisen at all.

For this construction it seems to me that there is clear and distinct authority.

In *Webb* v. *Grace*, 2 Ph. 701, a covenant to pay to a single woman during her life, subject to the proviso after contained, an annuity of £40, provided that if she married, the annuity should be reduced to £20, was held to be valid because it was in effect an agreement to pay £40 a year to her during so much of her life as she should remain unmarried, and £20 a year afterwards, and that this was a limitation, not a condition.

In *Heath* v. *Lewis*, 3 D. M. & G. 954, a gift by will to a woman who had never been married, if she should be unmarried at the death of M., of £2 10*s.* a month during her life if she should so long remain unmarried, was read "as a limitation as distinguished from a condition," and therefore the payments ceased on her marriage. This gift might have been construed to be a defeasible life annuity more easily than the provision in the will now before me, and of course the defeasance would have been void.

In *Evans* v. *Rosser*, 2 H. & M. 190, the testator gave real and personal estate to his son-in-law during the term of his life or marriage again, and after his death or marriage, over; and it was held that this was a limitation till marriage, and not a gift of a life estate defeasible on marriage.

The same construction was applied in the well-known case of *Rochford* v. *Hackman*, 9 Hare, 475, where a limitation in form determining a life estate upon alienation, was held to amount to a limitation until alienation and then over — a construction which has been followed in a multitude of cases since that decision.

But it is said that the court is bound by authority to hold that the legatee in this case is entitled to £2 10*s.* a week, whether she lives apart from her husband or not. The authorities cited demand a careful consideration. Undoubtedly our law, in dealing with bequests of personal property, has adopted some doctrines of the civil law which

seem to me much less satisfactory than the rules of the common law which we apply in the case of devises of real estate. Swinburne (On Wills, part 4, s. 6, ed. 1611, p. 138; ed. 1590, p. 122) states four sorts of impossible conditions, of which the second are "those which be contrary to law or good manners," instancing a gift of £100 to A. B. if he murder such a man or deflower such a woman. Then he says (part 4, s. 6, ed. 1611, p. 140; ed. 1590, p. 124) that where a condition is impossible "such condition hindereth not the . . . legatary, but that he may . . . recover the legacy, as if such had not been at all expressed." And he further says (part 4, s. 6, ed. 1611, p. 142; ed. 1590, p. 127), "When the condition is both impossible and unhonest . . . the disposition is thereby void: and that in disfavor of the testator, who added such a condition, whereas if the condition had been only impossible or unlawful, the disposition had been good, and that in favor of the testament."

Jarman on Wills (4th ed. vol. ii. p. 12) states the law, adopted from the civil law, to be that where a condition precedent is originally impossible or is made so by the act or default of the testator, or is illegal as involving *malum prohibitum*, the bequest is absolute, just as if the condition had been subsequent: but that, where it is illegal as involving *malum in se*, the civil agrees with the common law in holding both gift and condition void.

This law is recognized in Williams on Executors (6th ed., p. 1174; 8th ed., pp. 1269, 1270).

In Tothill's Reports (ed. 1671, p. 141; ed. 1820, p. 78) is the following short note of a case — *Tennant* v. *Braie* (Nov. 8, 6 Jac.): "A devise made to the daughter to pay her a sum of money if she will be divorced from her husband, the gift made good, though the condition void."

The doctrine that conditions precedent as well as conditions subsequent which are against the policy of the law are treated as void in cases of legacies of personal estate, and that the legacy "stands pure and simple," is distinctly recognized by Lord Hardwicke in *Reynish* v. *Martin*, 3 Atk. 330, 332: and the rules borrowed from the civil law were held by the late Master of the Rolls to apply to a mixed fund of the proceeds of real and personal estate: *Bellairs* v. *Bellairs*, Law Rep. 18 Eq. 510.

I assume, therefore, that if this is to be treated as a legacy given upon a precedent condition or defeasible by a subsequent condition which is bad as involving that which is *malum prohibitum*, the legacy must take effect, discharged of the condition.

In *Brown* v. *Peck*, 1 Eden, 140, the testator, noticing in his will that his niece Rebecca had married without the consent of her mother, directed that if she lived with her husband his executor should pay her £2 a month and no more; but if she lived from him and with her mother, then they should allow her £5 a month. Lord Keeper Henley held that she was entitled to the monthly payment of £5, "and that the

condition annexed being both impossible at the time of imposing it, and *contra bonos mores*, the legacy was simple and pure." I have referred to the registrar's book, and it seems clear that the condition was only impossible in the sense that everything which is prohibited by law is so in the contemplation of law. The husband, wife and mother seem to have been all three living. It is evident that the will was read as a gift of £5 a month to Rebecca for life upon condition that she did not live with her husband, or £5 a month for life cut down to £2 if she should live with him. Such a condition was against the policy of the law, and was therefore treated as a nullity. It appears from the Registrar's Book that the point was not argued, the other parties desiring that the legatee should have the £5 a month.

In *Wren* v. *Bradley*, 2 De G. & Sm. 49, one bequest was to pay to the testator's daughter, in case she should be living apart from her husband A., and should continue so to do during the lifetime of the testator's wife, an annuity of £30; but, if she should cohabit with him, it should cease during such cohabitation. The husband and wife were living apart at the date of the will, but were living together at the death of the testator, and the Vice-Chancellor, evidently with considerable hesitation, held that she was entitled to the gift discharged from the condition. He came to the same conclusion with respect to a direction to pay the interest of one-third of the residue to his said daughter "during such time as she shall continue to live apart from her said husband," but if she cohabited with him the income was to be paid to other persons, and after her death the capital was given over. This latter gift is in the form of a limitation rather than a condition.

I must follow these decisions in any case governed by them: but the construction of one set of words is not binding when you are construing a different provision. Because the court in those cases held the words were conditional it does not follow that other words are to be so construed. The decisions are only binding when the bequest is ascertained to be conditional by independent construction. They do not lay down any rule what bequests are to be so considered; no canon of construction is established by either of the cases for this purpose.

I confess that I find it difficult to understand these two decisions. As to *Brown* v. *Peck*, 1 Eden, 140, the legatee must have been entitled to the gift of £2 a month. That was not affected by any illegality. If the reason given in the short report be good, she was entitled to the £5 a month as well as the £2. The only mode of arriving at the decision was by treating it as an annuity of £5 a month during the joint lives of the husband and wife, cut down to £2 a month if they lived together. I should have had great difficulty in so construing it. But such a bequest is altogether different from a gift of a weekly payment during a period only defined by the legatee living apart from her husband. In that respect the wording of the bequest in this case differs materially from that in *Brown* v. *Peck*.

Here the payments are to be made "during such time as she may

live apart from her husband," and there is no alternative life annuity or gift for any longer period. In *Brown* v. *Peck* it was, if she lived with her husband £2 a month, but if she lived from him £5 a month, one or other of those payments being intended to last during the joint lives.

In *Wren* v. *Bradley*, 2 De G. & Sm. 49, however, the gifts more nearly resembled the bequest in the present case, especially the gift of interest of one-third of the residue, which was to be paid "during such time as she should continue to live apart." The gift of residue was obviously construed as a life-estate, with a conditional limitation divesting it, which could be rejected. With all respect, I think this construction doubtful. But, again, the words differ from those in the present case. It was more possible to construe the gift as a defeasible life interest than it would be to put that construction upon the words I have to consider.

In one sense the rule rejecting certain conditions, which is borrowed from the civil law, is a rule of construction. That is, when you find a legacy coupled with an invalid condition, the will is to be construed as if the condition was not there. But, obviously, it must first be determined whether there is a conditional legacy: and the construction for the purpose is independent of and must precede the application of the rule.

I hold that the legatee in this case is not entitled to any payment of £2 10*s*., because these payments are not legacies given upon a condition, but are to be made only within certain limits which the court has no power to alter.

Mrs. Maconochie appealed, and the appeal was argued on the 7th and 8th of June, 1888.

Marten, Q. C., and *Whitehouse*, for the appellant.

Ince, Q. C., and *Methold*, for the residuary legatee.

June 9th. COTTON, L. J. The question we have to decide is whether the trustee of the will of Mr. John Moore ought to pay the sum of £2 10*s*. per week to Mrs. Maconochie, a sister of the testator. The testator by his will gave all his property to a trustee "upon trust (after payment thereout of my debts, funeral and testamentary expenses) to pay to my sister Mary Maconochie during such time as she may live apart from her husband before my son attains the age of twenty-one years the sum of £2 10*s*. per week for her maintenance while so living apart from her husband." When the will was made, Mrs. Maconochie was living with her husband, and continued to do so until after the testator's death. The testator did not like the husband, and his apparent object was to induce the wife to live separate from him. If so, the gift was for a purpose which is contrary to the law of England, for that law does not allow provisions made in contemplation of a future separation between husband and wife. The appellant contends that the gift is to operate as a direction that £2 10*s*. per week shall be paid to her from the death of the testator, though she is living with her husband, thus

entirely altering the amount of the gift made to her by the testator. She contends that the gift is a gift of personalty subject to an illegal condition precedent, and that according to the doctrine of the civil law, which has been adopted by our law as to personal legacies, the illegal condition may be rejected, leaving the gift absolute. The rule is thus stated by Mr. Jarman (On Wills, 4th ed. vol. ii. p. 12): "But with respect to legacies out of personal estate, the civil law, which in this respect has been adopted by courts of equity, differs in some respects from the common law in its treatment of conditions precedent; the rule of the civil law being that where a condition precedent is originally impossible, or is made so by the act or default of the testator, or is illegal as involving *malum prohibitum*, the bequest is absolute, just as if the condition had been subsequent. But where the performance of the condition is the sole motive of the bequest, or its impossibility was unknown to the testator, or the condition which was possible in its creation has since become impossible by the act of God, or where it is illegal as involving *malum in se*, in these cases the civil agrees with the common law in holding both gift and condition void."

According to English law if a condition subsequent which is to defeat an estate, is against the policy of the law, the gift is absolute, but if the illegal condition is precedent there is no gift. In the civil law a distinction is taken between what is *malum in se* and what is only *malum prohibitum*, but in the view I take of this case we need not consider within which of these two classes the restriction in the present case falls. Are the words relating to living separate a condition? In my opinion they are not a condition, but a part of the limitation, and although in some respects a condition and a limitation may have the same effect, yet in English law there is a great distinction between them. Here if you give effect to the appellant's contention, you give her what the testator never intended to give her, an annuity during the whole of her life if the son is so long under age. It is wrong to give to an expression a forced construction in order to prevent a particular result that follows from the natural construction. The construction does not depend on the civil law, and the civil law is binding only so far as it has been adopted by our courts. I therefore do not enter into the question whether the civil law regards this as a condition or a limitation, for, if it regards it as a limitation and yet applies the same rules to it as to a condition, no authority has been cited to show that the civil law has to that extent been followed in England. Many authorities have been cited, but it has not been laid down in any of them that a gift in this form is to be treated as a gift upon condition. In *Tennant* v. *Braie* (Toth., ed. 1671, p. 141; ed. 1820, p. 78), upon the fair construction of the words, the gift was a gift upon condition, not a limited gift. A sum was to be paid once for all if a woman was divorced. There was nothing imposing a limit on the duration of the gift. In *Brown* v. *Peck*, 1 Eden, 140, the report is not clear either as regards the facts or the principle laid down. The testator, after no-

ticing that his niece had married without the consent of her mother, directed that if she lived with her husband his executors should pay her £2 per month and no more, but if she lived from him and with her mother, then they should allow her £5 per month. Lord Henley treated this as a condition, for he says "the condition annexed being both impossible at the time of imposing it, and *contra bonos mores*, the legacy was simple and pure." What was meant by "impossible" it is hard to say, but that is not material. All that is of importance is that it was treated as a condition, and the words could reasonably be so construed. *Wren* v. *Bradley*, 2 De G. & Sm. 49, occasions more difficulty. There was first a gift of an annuity to the testator's daughter subject to conditions which were *contra bonos mores*. Then there was a gift of the income of one-third of an accumulated fund to the same daughter, "during such time as she shall continue to live apart from her said husband Abraham Wren," and then came a condition in the form of a subsequent condition, that if she should at any time cohabit with her husband, then during such time as she should cohabit with him the income should be paid to other persons. It was proved that at the date of the will she was living apart from her husband. The Vice-Chancellor appears to have been impressed by that, and to have looked at the gift of the income as an immediate gift of it to the wife, subject to a proviso that if she returned to cohabitation the trust for payment to her should cease. I think this was the real ground of his decision, though he does not clearly state his reasons. I think his view must have been that, she being at the time separated from her husband, the gift was a simple gift to her with a subsequent condition defeating it if she returned to cohabitation. If that construction of the will be adopted as correct there is no difficulty about the decision, for as to the annuity the rule of the civil law clearly applied. None of the cases in my judgment warrant our applying it here, and in my opinion Mr. Justice Kay came to a correct conclusion. The gift here is not a gift of an annuity subject to a condition, but a limited gift, the commencement and duration of which are fixed in a way which the law does not allow.

Bowen, L. J. I am of the same opinion. At the date of the will the testator's sister was living with her husband. The testator directs his trustees to pay to her during such time as she may live apart from her husband, before the testator's son attains twenty-one, £2 10*s.* per week for her maintenance whilst so living apart from her husband. There can be no question that the object of this gift was to promote separation, an object which is against the policy of the law, and Mr. Justice Kay has decided that the gift is bad.

The argument for the appellant was twofold. First, she contended that the condition was subsequent and might be rejected, leaving the gift absolute; secondly, that if it was a condition precedent, this being a gift out of pure personalty, the doctrine of the civil law applied and the gift was absolute, for which *Harvey* v. *Aston*, 1 Atk. 361, and

Reynish v. *Martin*, 3 Atk. 330, were referred to, where Lord Hardwicke states the rule of the civil law and the extent to which our courts have adopted it. There is a great distinction in our law between conditions precedent and subsequent. Lord Hardwicke, in *Reynish* v. *Martin*, says (3 Atk. 332): "The civil law considering the condition, whether precedent or subsequent, as unlawful, and absolutely void, the legacy stands pure and simple. But in our law, where the condition is precedent, the legatary takes nothing till the condition is performed, and consequently has no right to come and demand the legacy; but it is otherwise where the condition is subsequent, for in that case the legatary has a right, and the court will decree him the legacy; but this difference only holds where the legacy is a charge on the real assets, and therefore, if this had been merely a personal legacy, should have been of opinion that as the marriage without consent would not have precluded Mary of her right to this legacy in the ecclesiastical court, no more would it have done so here: and to this purpose several cases were cited, which are taken notice of in the case of *Harvey* v. *Aston*, and which I shall not repeat, but refer to that case for them." Accepting that as law with respect to legacies of personal estate on a condition, the question remains whether this is a legacy on a condition. If not, then, unless it can be shown that the rule of the civil law extends to limitations as well as to conditions, and that our law has adopted it to that extent, the rule cannot apply. Is there here a condition? In one sense the gift does contain a condition, but it contains something more than either a condition precedent or a condition subsequent, and must be held to create a limitation. If the subject of gift here had been real estate, this would have been a limitation, not a mere condition, just as a gift to a woman *dum sola vixerit* is a conditional limitation, not a mere condition. But why should that be held to be a mere condition in the case of personalty which is not so in the case of realty? Here the sister's living apart from her husband is the measure of the gift to her, and if that be taken away, the *quantum* of the gift is altered. This was the ground taken by Mr. Justice Kay. No authority has been cited to show that limitations are treated by the civil law in the same way as conditions, but if they were it would not follow that they should be so treated in our courts. This is a gift which begins when the sister begins to live apart from her husband, continues while she lives apart from him, and comes to an end when she ceases to live apart from him.

As regards the cases cited, *Tennant* v. *Braie*, Toth., ed. 1820, p. 78, is a case of a gift upon condition, though it is so meagrely reported that I should hesitate before acting upon it. *Brown* v. *Peck*, 1 Eden, 140, appears to have been compromised after an expression of opinion by the court. *Wren* v. *Bradley*, 2 De G. & Sm. 49, is a peculiar case. There were two gifts, the first of which was clearly a gift on condition; the second gift is more difficult. I think that the Vice-Chancellor considered the context of the will to throw light on the second gift, and to

lead to the conclusion that it was a gift to a woman who was at the time living separate from her husband, with a condition defeating it if she returned to cohabitation. The cases therefore do not support the view that the doctrine of the civil law is to be extended to limitations, and in my opinion the judge below came to a right conclusion. One regrets taking away a dead man's bounty from the object of it under the very circumstances in which he intended her to have it, but we must not depart from the law.

FRY, L. J. I am of the same opinion.

NOTE ON CONDITIONS IN RESTRAINT OF MARRIAGE. — Conditions restraining marriage absolutely are subsequent in their nature. Such conditions are void. This seems never to have been distinctly held as to real estate in England. But see *Perrin* v. *Lyon*, 9 East, 170, 183 (1807); *Jones* v. *Jones*, 1 Q. B. D. 279, 282 (1876); 2 Jarm. Wills (4th ed.), 50, — cf., however, *Bellairs* v. *Bellairs*, L. R. 18 Eq. 510 (1874); *Comm.* v. *Stauffer*, 10 Pa. 350 (1849). See *Otis* v. *Prince*, 10 Gray, 581 (1858); *Randall* v. *Marble*, 69 Me. 310 (1879). It has been, however, so held in cases of personalty. *Morley* v. *Reanoldson*, 2 Hare, 570 (1843); and of a mixed fund made up of the proceeds of realty and personalty. *Bellairs* v. *Bellairs*, L. R. 18 Eq. 510 (1874).

When the language of the will shows that the intention of the testator was not to restrain marriage, but to furnish a maintenance to the devisee or legatee while single, a provision confining a devise or legacy to the period during which the devisee or legatee remains single, is valid. This has been held in the case of real estate. *Jones* v. *Jones*, 1 Q. B. D. 279 (1876). Cf. *Bennett* v. *Robinson*, 10 Watts, 348 (1840). In personal property the same principle seems to be adopted, though it is commonly put in a more formal and less rational shape; viz., that a limitation terminating an interest on marriage is good, although a condition is not. *Heath* v. *Lewis*, 3 De G. M. & G. 954 (1853); *Evans* v. *Rosser*, 2 Hem. & Mil. 190 (1864); *Hotz's Estate*, 38 Pa. 422 (1861); *Arthur* v. *Cole*, 56 Md. 100 (1880); *Selden* v. *Keen*, 27 Grat. 576 (1876). In this last case the doctrine is put more in the form which is given to it in *Jones* v. *Jones* than is usual in cases of personalty. See *Webb* v. *Grace*, 2 Phil. 701 (1848), overruling s. c. 15 Sim. 384.

Exception. — A condition forfeiting the estate of a widow on remarriage is valid, both as to real estate, *Tricker* v. *Kingsbury*, 7 W. R. 652 (1859); *Phillips* v. *Medbury*, 7 Conn. 568 (1829); *Bennett* v. *Robinson*, 10 Watts, 348 (1840); *Comm.* v. *Stauffer*, 10 Pa. 350 (1849), — see *Gough* v. *Manning*, 26 Md. 347 (1866), — and as to personal property, *Barton* v. *Barton*, 2 Vern. 308 (1694); although, as will be seen below, such a condition attached to a legacy may sometimes be deemed *in terrorem* only. It makes no difference whether the widow be the widow of the testator or of some other person. *Newton* v. *Marsden*, 2 J. & H. 356 (1862). Contra, *Crawford* v. *Thompson*, 91 Ind. 266 (1883). And what is law for a widow is law for a widower also. *Allen* v. *Jackson*, 1 Ch. Div. 399 (1875); *Bostick* v. *Blades*, 59 Md. 231 (1882).

Conditions subsequent in partial restraint of marriage are valid both in devises and legacies, *e. g.*, not to marry without consent of T., *Fry* v. *Porter*, 1 Ch. Cas. 138 (1669); not to marry a Scotchman, *Perrin* v. *Lyon*, 9 East, 170 (1807); not to marry contrary to the rules of the Quakers, *Haughton* v. *Haughton*, 1 Moll. 611 (1824); not to marry a domestic servant, *Jenner* v. *Turner*, 16 Ch. D. 188 (1880); marrying any one but a Jew, *Hodgson* v. *Halford*, 11 Ch. D. 959 (1879); not to marry a daughter of A. B., *Graydon* v. *Graydon*, 23 N. J. Eq. 229 (1872); *Phillips* v. *Ferguson*, 85 Va. 509 (1888). But where the restraint, though in form partial, renders marriage practically impossible or very difficult, then the condition imposing it is invalid. *E. g.*, not to marry any one who has not freehold property of £500 a year, *Reily* v. *Monck*,

3 Ridgw. 205 (1795). Cf. *Duddy* v. *Gresham*, 2 L. R. Ir. 442 (1878); *Maddox* v. *Maddox*, 11 Grat. 804 (1854).

If a condition subsequent against marriage becomes impossible, then, on general principles, the estate becomes indefeasible, *Peyton* v. *Bury*, 2 P. Wms. 626 (1731); *Collett* v. *Collett*, 35 Beav. 312 (1866). See *Booth* v. *Meyer*, 38 L. T. N. S. 125 (1877).

Although conditions imposing partial restraints on marriage, or absolutely restraining the marriage of widows and widowers, are not invalid as against public policy, yet there is a rule that such a condition attached to a bequest of personal property, if there is no gift over upon breach, is supposed not to be intended seriously, but to be *in terrorem* only. *Ballasis* v. *Ermine*, 1 Ch. Cas. 22 (1663).

This singular doctrine, which has been derived by courts of equity from the civil law, — see *Stackpole* v. *Beaumont*, 3 Ves. Jr. 89 (1796), — has no application to devises of land. *Reves* v. *Herne*, 5 Vin. Ab. 343 (1730). The decision to the contrary in *Otis* v. *Prince*, 10 Gray, 581 (1858) cannot be upheld; but see *Randall* v. *Marble*, 69 Me. 310 (1879). As to the law when realty and personalty are given together, see *Duddy* v. *Gresham*, 2 L. R. Ir. 442 (1878).

If there is a gift over, the doctrine does not apply, either because the gift over is deemed to show that the testator was serious in his threat, or because the person to whom the gift over is made has rights which the court cannot disregard. *Stratton* v. *Grymes*, 2 Vern. 357 (1698). The fact that there is a residuary clause in the same will is not considered, for the purposes of this rule, as a gift over, *Garret* v. *Pritty*, 2 Vern. 293 (1693); *Semphill* v. *Bayly*, Prec. Ch. 562 (1721); *Wheeler* v. *Bingham*, 3 Atk. 364 (1746), overruling *Amos* v. *Horner*, 1 Eq. Cas. Ab. 112, pl. 9 (1699), — see, however, *Graydon* v. *Graydon*, 23 N. J. Eq. 229 (1872), — unless there be an express direction that the forfeited legacy fall into the residue. *Lloyd* v. *Branton*, 3 Mer. 108 (1817).

The notion expressed in *Otis* v. *Prince* and *Randall* v. *Marble*, *ubi sup.*, that a gift over to the testator's heirs is not to be considered a gift because the heirs take by descent, would seem erroneous (even if the doctrine applied to real estate), as the question is really one of the testator's meaning, as is shown in *Gough* v. *Manning*, 26 Md. 347, 365 (1866).

The cases have generally arisen on conditions working partial restraints on marriage, *e. g.* requiring consent to marriage; but the rule also applies to conditions imposing absolute restrictions on the marriage of widows. *Marples* v. *Bainbridge*, 6 Mad. 590 (1816); *Parsons* v. *Winslow*, 6 Mass. 169 (1810); *M'Ilvaine* v. *Gethen*, 3 Whart. 575 (1838); *Hoopes* v. *Dundas*, 10 Pa. 75 (1848); *Binnerman* v. *Weaver*, 8 Md. 517 (1855).

The rule applies to conditions subsequent. It has been applied also to conditions precedent. *Reynish* v. *Martin*, 3 Atk. 330 (1746). There have been, however, several cases of conditions precedent in which it has not been applied.

One exception seems to be well established. A condition precedent that a legatee shall not marry before a certain age, or before a certain age without consent, will be enforced. *Hemmings* v. *Munckley*, 1 Bro. C. C. 304 (1783); *Scott* v. *Tyler*, Dick. 712 (1788); *Stackpole* v. *Beaumont*, 3 Ves. Jr. 88 (1796); *Younge* v. *Furze*, 8 De G. M. & G. 756 (1857); *In re Brown's Will*, 18 Ch. D. 61 (1881). See *Creagh* v. *Wilson*, 2 Vern. 572 (1706). Cf. *Salisbury* v. *Bennet*, 2 Vern. 223 (1691).

Another exception, perhaps not quite so well settled, is that if a smaller sum is given to a legatee, and in lieu thereof a larger sum upon her marriage with consent, she does not take the larger sum upon her marriage without consent. *Gillet* v. *Wray*, 1 P. Wms. 284 (1715).

See another case of condition precedent, *Phillips* v. *Ferguson*, 85 Va. 509 (1888).

It has been said above that this rule has no application to devises of real estate; neither has it any application to legacies charged on real estate, so far as they come upon the real estate, *Reves* v. *Herne*, 5 Vin. Ab. 343 (1730); *Harvey* v. *Aston*, 1 Atk. 361 (1737); *Hogan* v. *Curtin*, 88 N. Y. 162 (1882); but it does apply so far as they are paid out of the personalty, *Reynish* v. *Martin*, 3 Atk. 330 (1746), — in which case,

by means of the doctrine of marshalling, the legacy came really out of land. The rule has also been held by Sir George Jessel, M. R., to apply to a legacy payable out of a fund consisting of the mixed proceeds of realty and personalty. *Bellairs* v. *Bellairs*, L. R. 18 Eq. 510 (1874). In this last case the Master of the Rolls expressed an opinion that the rule would apply to a legacy payable out of the proceeds of real estate ordered to be sold.

Condition not to dispute a Will. — On conditions not to dispute wills, and the question when they are considered *in terrorem* only, see cases collected in 2 Jarm. Wills (5th ed.), 58, also *Chew's Appeal*, 45 Pa. 228 (1863); *Bradford* v. *Bradford*, 19 Ohio St. 546 1869); *Thompson* v. *Gaut*, 14 Lea, 310 (1884); *Hoit* v. *Hoit*, 42 N. J. Eq. 388 (1886).

CHAPTER II.

FORFEITURE AND RESTRAINTS ON ALIENATION.

SECTION I.

FORFEITURE ON ALIENATION.

A. *Estates of Inheritance.*

Lit. § 360. Also, if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is enfeoffed of lands or tenements, he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason, and therefore such a condition is void.

Co. Lit. 223 a. "*Also, if a feoffment be made, &c.*" And the like law is of a devise in fee upon condition that the devisee shall not alien, the condition is void, and so it is of a grant, release, confirmation, or any other conveyance whereby a fee simple doth pass. For it is absurd and repugnant to reason that he, that hath no possibility to have the land revert to him, should restrain his feoffee in fee simple of all his power to alien. And so it is if a man be possessed of a lease for years, or of a horse, or of any other chattel real or personal, and give or sell his whole interest or property therein upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him, so as he hath no possibility of a reverter, and it is against trade and traffic, and bargaining and contracting between man and man: and it is within the reason of our author that it should ouster him of all power given to him. *Iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem;* and *rerum suarum quilibet est moderator, et arbiter.* And again, *regulariter non valet pactum de re mea non alienanda.* But these are to be understood of conditions annexed to the grant or sale itself in respect of the repugnancy, and not to any other collateral thing, as hereafter shall appear. Where our author putteth his case of a feoffment of land, that is put but for an example: for if a man be seised of a seigniory, or a rent, or an advowson, or common, or any other inheritance that lieth in grant, and by his deed granteth the same to a man and to his heirs upon condition that he shall not alien, this

condition is void. But some have said that a man may grant a rent charge newly created out of lands to a man and to his heirs upon condition that he shall not alien that, that is good, because the rent is of his own creation; but this is against the reason and opinion of our author, and against the height and purity of a fee simple.

A man before the Statute of *Quia emptores terrarum* might have made a feoffment in fee, and added further, that if he or his heirs did alien without license, that he should pay a fine, then this had been good. And so it is said, that then the lord might have restrained the alienation of his tenant by condition, because the lord had a possibility of reverter; and so it is in the king's case at this day, because he may reserve a tenure to himself.

If A. be seised of Black Acre in fee, and B. enfeoffeth him of White Acre upon condition that A. shall not alien Black Acre, the condition is good, for the condition is annexed to other land, and ousteth not the feoffee of his power to alien the land whereof the feoffment is made, and so no repugnancy to the state passed by the feoffment; and so it is of gifts, or sale of chattels real or personal.

Lit. § 361. But if the condition be such, that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one, &c., or the like, which conditions do not take away all power of alienation from the feoffee, &c., then such condition is good.

Co. Lit. 223 a, 223 b. If a feoffment in fee be made upon condition that the feoffee shall not enfeoff I. S. or any of his heirs or issues, etc., this is good, for he doth not restrain the feoffee of all his power: the reason here yielded by our author is worthy of observation. And in this case if the feoffee enfeoff I. N. of intent and purpose that he shall enfeoff I. S., some hold that this is a breach of the condition, for *quando aliquid prohibetur fieri, ex directo prohibetur et per obliquum.*

If a feoffment be made upon condition that the feoffee shall not alien in mortmain, this is good, because such alienation is prohibited by law, and regularly whatsoever is prohibited by the law, may be prohibited by condition, be it *malum prohibitum*, or *malum in se*. In ancient deeds of feoffment in fee there was most commonly a clause, *quod licitum sit donatori rem datam dare vel vendere cui voluerit, exceptis viris religiosis et Judæis.*

Lit. § 362. Also, if lands be given in tail upon condition, that the tenant in tail nor his heirs shall not alien in fee, nor in tail, nor for term of another's life, but only for their own lives, &c., such condition is good. And the reason is, for that when he maketh such alienation and discontinuance of the entail, he doth contrary to the intent of the donor, for which the Statute of W. 2, cap. 1, was made, by which Statute the estates in tail are ordained.

Co. Lit. 223 b, 224 a. Note here, the double negative in legal construction shall not hinder the negative, viz., *sub conditione quod ipse*

nec hæredes sui non alienarent. And therefore the grammatical construction is not always in judgment of law to be followed.

"*But only for their own lives, &c.*" And yet if a man make a gift in tail, upon condition that he shall not make a lease for his own life, albeit the state be lawful, yet the condition is good, because the reversion is in the donor. As if a man make a lease for life or years upon condition, that they shall not grant over their estate or let the land to others, this is good, and yet the grant or lease should be lawful. If a man make a gift in tail upon condition that he shall not make a lease for three lives or 21 years according to the Statute of 32 H. 8, the condition is good, for the Statute doth give him power to make such leases, which may be restrained by condition, and by his own agreement; for this power is not incident to the estate, but given to him collaterally by the Act, according to that rule of law, *quilibet potest renunciare juri pro se introducto.*

"*When he maketh such alienation and discontinuance of the entail.*" And therefore if a gift in tail be made upon condition, that the donee, &c., shall not alien, this condition is good to some intents, and void to some; for, as to all those alienations which amount to any discontinuance of the estate tail (as Littleton here speaketh;) or is against the Statute of Westminster 2, the condition is good without question. But as to a common recovery the condition is void, because this is no discontinuance, but a bar, and this common recovery is not restrained by the said Statute of W. 2. And therefore such a condition is repugnant to the estate tail; for it is to be observed, that to this estate tail there be divers incidents. First, to be dispunished of waste. Secondly, that the wife of the donee in tail shall be endowed. Thirdly, that the husband of a feme donee after issue shall be tenant by the curtesy. Fourthly, that tenant in tail may suffer a common recovery: and therefore if a man make a gift in tail, upon condition to restrain him of any of these incidents, the condition is repugnant and void in law. And it is to be observed, that a collateral warranty or a lineal with assets in respect of the recompense, is not restrained by the Statute of *Donis conditionalibus*, no more is the common recovery in respect of the intended recompense. And Littleton, to the intent to exclude the common recovery, saith, *such alienation and discontinuance*, joining them together.

If a man before the Statute of *Donis conditionalibus* had made a gift to a man and to the heirs of his body, upon condition, that after issue he should not have power to sell, this condition should have been repugnant and void. *Pari ratione*, after the Statute a man makes a gift in tail, the law *tacite* gives him power to suffer a common recovery; therefore to add a condition, that he shall have no power to suffer a common recovery, is repugnant and void.[1]

[1] See *Mildmay's Case*, 6 Co. 40 a (1605); and in *Mary Portington's Case*, 10 Co. 35 b (1613), it was *held*, that a condition attached to an estate tail that the tenant should not agree to suffer a recovery or do any act towards it was void. — Ed.

If a man make a feoffment to a baron and feme in fee, upon condition, that they shall not alien, to some intent this is good, and to some intent it is void: for to restrain an alienation by feoffment, or alienation by deed, it is good, because such an alienation is tortious and voidable: but to restrain their alienation by fine is repugnant and void, because it is lawful and unavoidable.

It is said, that if a man enfeoff an infant in fee, upon condition that he shall not alien, this is good to restrain alienations during his minority, but not after his full age.

It is likewise said, that a man by license may give land to a bishop and his successors, or to an abbot and his successors, and add a condition to it, that they shall not without the consent of their chapter or convent, alien, because it was intended a mortmain, that is, that it should forever continue in that see or house, for that they had it *en auter droit*, for religious and good uses.

"*The Statute of W.* 2. *cap.* 1." Hereby it appeareth, that whatsoever is prohibited by the intent of any Act of Parliament, may be prohibited by condition, as hath been said.

ANONYMOUS.

Queen's Bench. 1584.

[*Reported* 1 *Leon.* 292.]

The case was, A. gave lands in tail to B. upon condition, that if the donee or any of his heirs alien, or discontinue, &c., the land or any part of it, that then the donor do re-enter: The donee hath issue two daughters and dieth: One of the two daughters levieth a fine, *sur conusans de droit come ceo*, to her sister: *Hedle*, Serjeant, the donor may enter, for although the sisters to many intents are but one heir, yet in truth they are several heirs, and each of them shall sue livery, 17 E. 3. If one of the sisters be discharged by the lord, the lord shall lose the wardship of her, and yet the heir is not discharged: And if every sister be heir to divers respects, then the fine by the one sister is a cause of forfeiture. *Harris, contrary*, for conditions which go in defeating of estates shall be taken shortly, and here both the sisters are one heir, and therefore the discontinuance by the one is not the act of the other: Clench, Justice: The words are, Or any of his heirs, therefore it is a forfeiture, *quod fuit concessum per totam Curiam:* And judgment was given accordingly.[1]

[1] S. C. *semble, sub nom. Croker* v. *Trevithin*, Cro. El. 35.

LARGE'S CASE.

Queen's Bench. 1586.

[*Reported* 2 *Leon.* 82.]

The case was, A. seised of lands in fee, devised the lands to his wife, until William his son should come to the age of 22 years, and then the remainder of part of the lands, to his two sons, A. and John, the remainder of other part of his lands, to two others of his said sons, upon condition, that if any of his said sons before William should come to the age of 22 years, shall go about to make any sale of any part, &c. he shall forever lose the lands, and the same shall remain over, &c. And before his said son William came to the age of 22 years, one of the other sons leased that which to him belonged, for 60 years, and so from 60 years to 60 years, until 240 years ended, &c. *Bois.* A. and J. are joint-tenants of the remainder, and he said, that the opinion of Audley, Lord Chancellor of England, is not law (*scil.*) where a man deviseth lands to two, and to their heirs, they are not joint tenants, as to the survivor, but if one of them dieth the survivor shall not have the whole, but the heir of his that dieth, shall have the moiety: See 30 H. 8, Br. Devise 29. And he said, that this lease, although it be for so many years, is not a sale intended within the will, and so is not a jointure. 46 E. 3. One was bounden, that he should not alien certain lands, and the obligor did thereof enfeoff his son and heir apparent, the same was held, to be no alienation within the condition of the obligation: Of the other side it was argued, the remainder doth not vest presently; for it is uncertain, if it shall vest at all; for if William dieth before he cometh to the age of 22 years, it was conceived by him, that the remainder shall never vest, for the words of the will are, "Then the lands shall remain," &c. 34 E. 3, Formedon 36. Land is devised to A. for life, and if he be disturbed by the heir of the devisor, that then the land shall remain to D. Here D. hath not any remainder, before that A. be disturbed; it was farther argued, that here is a good condition, and that the devisee is not utterly restrained from sale, but only until a certain time, (*scil.*) to the age of William of 22 years. And it was said, that this lease is a covenous lease, being made for 240 years, without any rent reserved: As such a lease made for 100 years, or 200 years, is mortmain, as well as if it had been an express feoffment, or alienation. But it was said by some, that here is not any sale at all, nor any lease; for the lessor himself hath not anything in the land demised: As if a man disseiseth a feme sole, and leaseth the lands, and afterwards marrieth the disseisee, he shall avoid his own lease, 5 E. 3. One was bound that he should not alien such a manor, the obligor alieneth one acre, parcel of it, the obligation is forfeit, see 29 H. 8, Br. Mortgage 39. A. leaseth to a religious house for 100 years,

and so from 100 years to 100 years, until 800 years be incurred, the same is mortmain, *vide* Stat. 7 E. 1. *Colore termini emere, vel vendere.* And in the principal case, if the devisee had entered into a Statute to the value of the land leased, by the intent of the will, the same had been a sale; and such was the opinion of the whole court: and by the court, the word *in perpetuum*, shall not be referred to the words precedent, but unto the words following; (*scil.*) *in perpetuum perdat* the lands. And if a custom be in the case that the infant of the age of 15 years may sell his lands, if he make a lease, the same is not warranted by the custom: And afterwards it was adjudged by the whole court, that the lease made as before, was a sale within the intent of the will of the devisor.[1]

KING *v.* BURCHELL.

CHANCERY. 1759.

[*Reported Amb.* 379.]

JOHN BLUNT, by will 26th October, 1731, devised after the death of his wife, and failing issue of her body, all that messuage, &c., in the parish of Hunton and Linton, in Kent, unto his cousin John Harris, second son of Thomas Harris, by his sister Sarah, for life, remainder to the issue male of his cousin John Harris, and to his and their heirs, share and share alike, and for want of such issue, to the issue female of his cousin John Harris, and her and their heirs, and for want of such issue, to William King, his heirs and assigns forever.

He also gave other houses at Maidstone to his wife, remainder to his cousin John Harris, for life, and from and immediately after the determination of that estate, to the issue male of the body of his cousin John Harris, and to their heirs, and for want of such issue, to his cousin William King, his heirs and assigns forever, with a proviso, that the bequests and limitations of all the premises limited to his cousin John Harris, and such issue male and female, is upon special consideration, that if John Harris or his issue, or any of them, shall alienate, mortgage, encumber, or commit any act or deed, whereby to alter, change, charge, or defeat the bequests, shall pay or cause to be paid, and he did thereby charge the premises with the payment of £2000 unto such person or persons, and his or their heirs, who could, should, or ought to take next, by virtue or means of any of the bequests or limitations.

John Harris had two daughters at the death of the testator, who were married to the defendants, and were heirs at law of the testator, and, together with their father, suffered a recovery of the houses at Maidstone, and declared the uses, &c. John Harris is since dead.

[1] s. c. 3 Leon. 182. See *Mandelbaum* v. *McDonell*, 29 Mich. 78 (1874).

Bill by plaintiff to be paid the £2000 out of the estate.

Yorke, Solicitor-General, and *Wilbraham*, for the plaintiff.

Pratt, Attorney-General, *Sewell*, and *Webb*, on the other side.

Henley, Lord Keeper, took time to consider; and on Tuesday, 20th November, delivered his opinion, That John Harris took an estate tail; and that the proviso was repugnant to the estate.[1]

BRADLEY *v.* PEIXOTO.

Chancery. 1797.

[*Reported* 3 *Ves.* 324.]

This cause arose upon the following disposition by the will of Thomas Bradley: —

"I give and bequeath to my son Henry Bradley the dividends arising from £1620 of my bank stock for his support during the term of his life: but at his decease the said £1620 bank stock, principal and interest, to devolve to his heirs, executors, administrators and assigns. Having observed during the term of my life so many fatal examples of parents having left their children in a state of opulence, who have afterwards been reduced to want the common necessaries of life, my principal view in this will is, that my wife and children may have a solid sufficiency to support them during their lives. For this purpose I will and most strictly ordain, that if my wife or any one of my children shall attempt to dispose of all or any part of the bank stock, the dividends from which is bequeathed to them in this will and testament for their support during their lives, such an attempt by my wife or any of my children shall exclude them, him or her, so attempting, from any benefit in this will and testament, and shall forfeit the whole of their share, principal and interest; which shall go and be divided unto and among my other children in equal shares, that will observe the tenor of this will and testament."

The bill was filed by Henry Bradley against one of the daughters of the testator, who had taken out administration. The prayer of the bill was, that the defendant might be decreed to transfer the £1620 bank stock to the plaintiff. The other children were out of the jurisdiction.

Master of the Rolls. [Sir Richard Pepper Arden.] The first clause is an absolute gift of the principal and dividends. But then comes this clause, with which the plaintiff does not comply; and the question is, whether by the rules of this court he can demand the legacy, not complying with the injunction, the testator has laid upon

[1] See *De Peyster* v. *Michael*, 6 N. Y. 467 (1852).

him; or rather whether the condition is consistent with the gift. Seeing the father's intent so clearly and strongly expressed I have taken some time to consider this case; and have endeavored to satisfy myself, that I am at liberty to refuse the plaintiff the demand, which he now makes. Indeed another reason for delaying my judgment was, that there appeared to be other children, who were interested in this question and were not parties to the cause. The reason given for not having them before the court is, that they are all out of the jurisdiction. Had they been in this country, I should have expected them to have been made defendants, to sustain their interests: but as they live abroad, the cause has proceeded without them; and according to the opinion, I have formed of this case, they are not necessary parties; because I feel myself obliged to say, that the proviso I have before stated is of no effect.

I have looked into the cases, that have been mentioned; and find it laid down as a rule long ago established, that where there is a gift with a condition inconsistent with and repugnant to such gift, the condition is wholly void. A condition, that tenant in fee shall not alien, is repugnant; and there are many other cases of the same sort: *Piers* v. *Winn*, 1 Vent. 321. Pollexf. 435. The report in Ventris is very confused: but it appears clearly from the report of this case in Pollexfen, as well as from many other cases, that the court meant to say, that where there is gift in tail with condition not to suffer a recovery, the condition is void. There are several cases of this kind collected in 2 Danv. Ab. 22, which show, that a condition repugnant to the nature of the estate given is void: Co. Lit. 223 a, Dy. 264. *Mildmay's Case*, 6 Co. 40. *Stukeley* v. *Butler*, Hob. 168, is of the same kind; where it was held, that an exception of the very thing, that is the subject of the gift, is of no effect. In all these cases the gift stands, and the condition or exception is rejected. In this case then I am under the necessity of declaring, that this is a gift with a qualification inconsistent with the gift; and the qualification must therefore be rejected. This is not like *Sockett* v. *Wray*, 4 Bro. C. C. 483; for there the gift was to a *feme covert* for life; and then to such uses as she should by will appoint. She could only appoint by will; and could not bind her executors by any deed in her life-time; and I declared in determining that case, that I should think otherwise in the case of a man or any person having an absolute interest. A man could bind his executors; but not a *feme covert*. If this had been a gift to the son for life, and after his death as he should appoint, and in default of appointment then to other persons, I desire not to be understood, that it would not be good: if in default of appointment it was to go to his executors, I should doubt, whether it would be so: but I give no opinion upon this. Upon the whole, I am obliged to hold this condition repugnant to the gift and therefore void. Declare, that the condition annexed to the legacy of £1620 bank stock is repugnant to and inconsistent with the interest given to the legatee of the stock, and therefore void; and

upon payment of the costs of this suit by the plaintiff let the stock be transferred to him.

In *Peixoto* v. *The Bank of England*, Chan. 3d of June, 1797, the subject of which was a disposition of stock by the same will in precisely the same manner, the LORD CHANCELLOR [LORD LOUGHBOROUGH] was very clearly of opinion, that it was an absolute, not a limited, interest; and decreed accordingly.[1]

DOE d. NORFOLK *v.* HAWKE.

KING'S BENCH. 1802.

[*Reported* 2 *East*, 481.]

ON the trial of an ejectment for a certain messuage and lands in Yorkshire, at the last York Assizes, a verdict was found for the plaintiff on the demise of John Ibbotson, and for the defendants on the demise of the Duke of Norfolk, subject to the opinion of the court on the following case.

Joseph Whiteley was lessee of the premises in question for the term of 21 years commencing from the 29th September 1789, under a lease granted to him by the Duke of Norfolk, dated 25th January 1790. Whiteley entered into possession of the premises under this lease, and made his will dated 10th October 1790, whereby he disposed of the premises in question as follows. "I give and bequeath to my nephew Abraham Ibbotson, with submission to the Duke of Norfolk, the tenant right of my farm at the Edgefield, which I hold by lease under his Grace, he paying the rent and conforming to the covenants in the lease; *but not to dispose of or sell the tenant right to any other person:* but *if he refuses to dwell there himself, or keep in his own possession*, then my will is, that my nephew John Ibbotson (one of the lessors of the plaintiff), shall have the tenant right of the farm at the Edgefield." And the testator directed (amongst other things) that the said farm should be delivered up as before willed a year and a day after his decease by his executrix: and he appointed his niece, Sarah Ibbotson, sole executrix, and gave the residue of his effects to her. The testator Whiteley died in January 1799, having continued in possession of the premises till his death. The executrix married Rowland Hartley, and duly proved the will, and administration was granted to her, and she and her husband entered into the possession of the premises on Whiteley's death. And in February 1800 possession of the premises was duly delivered by them, together with the lease, to A. Ibbotson, in pursuance of Whiteley's will, and A. Ibbotson continued in such possession till he quitted the same as after-mentioned. When

[1] But see *Williams* v. *Ash*, 1 How. 1 (1843).

A. Ibbotson was in possession of the premises J. Crookes lent him £25 on his note of hand; and thereupon A. Ibbotson *deposited* with Crookes *the lease* of the premises as a further security. At the time of lending the £25 it was agreed between Crookes and A. Ibbotson, that Crookes should have *the first chance* for the farm; but no actual valuation was made. Crookes made further advances to A. Ibbotson, amounting in all to £60; but Crookes knew nothing of Whiteley's will until the whole of the £60 had been advanced. Afterwards A. Ibbotson was arrested at the suit of R. Hartley, to whom he (A. Ibbotson) had given a warrant of attorney; and thereon Crookes paid for A. Ibbotson, at his request, £60 more, to effect A. Ibbotson's liberation. After this Crookes took from A. Ibbotson a warrant of attorney to confess a judgment, and a bill of sale of A. Ibbotson's goods; but never entered up judgment on such warrant of attorney. Then one William Greaves, at A. Ibbotson's request, paid off the money advanced by Crookes, and took from A. Ibbotson a fresh warrant of attorney to confess a judgment; and at the same time *the lease*, and a copy of Whiteley's will (which had been in Crookes' possession), were delivered by Crookes. *Judgment was entered up on the warrant of attorney so given to Greaves*, and execution thereon issued in Trinity Term 1801; but before the entry with Greaves' execution, one Joseph Schofield, another creditor of A. Ibbotson, had levied an execution upon part of the goods of A. Ibbotson, which execution being satisfied *by Greaves*, was withdrawn, and *possession was taken under his execution*, and *the lease* of the premises in question was on the 18th June 1801 publicly *sold and assigned by the sheriff under Greaves' execution* to the defendants, who were immediately put into possession of the premises, and now continue solely possessed thereof. A. Ibbotson quitted the premises in the morning before the sale, and has ever since *ceased to dwell there or have any possession thereof*. John Ibbotson (the lessor of the plaintiff) attended at the time and place of sale (which was public), and before the actual sale gave notice of his claim under Whiteley's will to the defendants. The question was, Whether the plaintiff were entitled to recover on the demise of John Ibbotson. If he were, the verdict to stand; if not, a nonsuit to be entered.

Wood, for the lessor of the plaintiff.

Lambe, contra.

Lord Ellenborough, C. J. The terms of this devise are to be considered as a conditional limitation, in which the interest of Abraham Ibbotson in the premises is limited on certain events, on the happening of which it is given over to John. And the question is, Whether the acts of the party whose incapacity is to be incurred on his refusal to dwell on the farm or keep it in his own possession, have not determined his interest? When he deposited the lease with Crookes as a further security for the several loans of money advanced by him, was this not a voluntary act? and when the lease was afterwards delivered

over to another creditor who took up the first demand, and to whom a warrant of attorney was at the same time given, and considering that by so giving up the lease he thereby disabled himself from mortgaging the premises, and by giving the warrant of attorney he enabled the creditor to dispossess him at his option, must he not be taken to have contemplated at the time the legal consequence of these acts which afterwards ensued? That these were voluntary acts there can be no doubt. He put the creditor in possession of the document of the farm; and by all the authorities he thereby gave a specific lien on the lease. For according to *Russel* v. *Russel*, 1 Bro. Chan. Cas. 269, and several other cases there mentioned, the making of such a deposit gives jurisdiction to a court of equity to compel a sale of the lease in discharge of the lien. As it then enables the other to turn the party out of possession in default of payment, it shows a purpose in the latter to part with the possession, and therefore the subsequent proceeding and execution is not strictly *in invitum*, so as to bring the case within that of *Doe* v. *Carter*. And there need not be fraud in the transaction; it is enough if there be a manifest intention to depart with the estate, followed by acts to that end, which if not produced immediately by the procurement of the party, may yet be said to be done with his assent. Upon the whole therefore it is enough to say that here was a voluntary departing with the estate.

Lawrence, J. The lease was given by the testator to Abraham Ibbotson, so long as he lived on the farm; the material words of the bequest are, "that he should not dispose of or sell the tenant-right to any other person: but if he *refused* to dwell there himself, or keep it in his own possession," then it was to go over to the lessor of the plaintiff. Now the word *refused* is only a figurative expression; meaning if the first taker *ceased* to dwell there. There was certainly no occasion for any person previously to inquire of him whether he would reside there or not, and that he should expressly *refuse* it.

Le Blanc, J. This would be a strong case if it rested even on the first point; for here are strong circumstances to show that this was a departing with the possession of the estate by the party's own act. Besides which, on the construction of the will it clearly appears to have been the intention of the testator that if A. Ibbotson ceased to live on the premises or keep them in his own possession, they should go over to John Ibbotson.

Postea to the plaintiff.

Grose, J., was absent from indisposition.

DOE d. GILL *v.* PEARSON.

KING'S BENCH. 1805.

[*Reported* 6 *East*, 173.]

In ejectment for the moiety of an estate in the parish of Ackworth, in the county of York, brought upon the demise of John Gill and Hannah his wife, stated in the declaration to have been made on 19th January, 41 G. 3, a verdict was found for the plaintiff at the last assizes at York before *Chambre*, J., subject to the opinion of this court upon the following case:

John Collett being seised in fee of the estate in question, by will dated 13th of January 1787, and duly executed, first directed that all his debts, legacies, annuities, and funeral expenses should be paid by his executrixes out of his real and personal estates, which he charged therewith. And then reciting that he had given a bond for £300 to his son-in-law R. Cuttle on his marriage with his daughter Margaret as a marriage portion, he therefore only gave to the said R. and M. Cuttle 1*s.* (besides the sum due on the bond) in full of all claim upon his estates or effects. He then bequeathed to his daughter Mary, the wife of D. Unwin, an annuity of £8 for her life, to be paid to her (for her separate use) by his executrixes, by quarterly payments, (with a power of distress for arrears.) He also bequeathed to D. Unwin 1*s.* in full of any claim on his estate or effects. He then bequeathed to the children of his said daughter Mary Unwin, viz. Thomas, Fanny, George, William, and Mary Unwin, £10 each, to be paid to them as they respectively attained their age of 21 years, and after their mother's death. And he willed that if any of the children of his said daughter Mary happened to die before he, she, or they attained the age of 21 years, without having lawful issue, then the share of either so dying should go to the survivors. He also bequeathed to another daughter, Fanny, the wife of James Brinon, an annuity of £9 for life, to be paid to her by his executrixes by half-yearly payments (for her separate use, and with a power of distress for arrears); and he gave the said James Brinon 1*s.* in full for any claim out of his estates or effects. He also bequeathed legacies of £20 to each of the children of his daughter Fanny, in the same manner as he had before done to the children of his daughter Mary Unwin. And directed all the legacies given to his grandchildren to be paid as they severally became due to them by his executrixes. He then devised as follows: "I give and devise unto my two daughters Ann Collett and Hannah Collett all my messuages, lands, tenements, and hereditaments at Ackworth, or elsewhere, in the county of York, (subject to the several legacies and annuities hereinbefore given by this my will, and made chargeable thereon,) to hold to them my said daughters Ann and Hannah, their heirs and assigns for-

ever, as tenants in common, and not as joint tenants; *upon this special proviso and condition*, that in case my said daughters Ann and Hannah Collett, or either of them, shall have no lawful issue, that then and in such case they or she having no lawful issue as aforesaid shall have no power to dispose of her share in the said estates so above given to them except to her sister or sisters, or to their children. All the rest, residue, and remainder of my real and personal estates, goods, chattels, and effects not hereinbefore disposed of, I give, devise, and bequeath unto my said two daughters Ann Collett and Hannah Collett, their heirs, executors, and administrators, and do constitute them joint executrixes," &c. The testator John Collett shortly after making his will died seised in fee of the estate in question, leaving no son, but five daughters, Mary, then the wife of D. Unwin, since deceased; Ann, afterwards the wife of the defendant James Wait, also since deceased; Frances, then the wife of James Brinon, also since deceased; Margaret, then the wife of Richard Cuttle, now living; and Hannah, afterwards the wife of the lessor of the plaintiff J. Gill, also now living. Ann the wife of J. Wait never had any issue, but all the other four daughters have had issue which are now alive. Upon the death of the testator, his daughters Ann and Hannah entered upon his real estates. Soon after Hannah married John Gill, the lessor of the plaintiff, and Ann married the defendant J. Wait. The defendant Wait has for some years enjoyed one moiety of the estate in right of Ann his wife, and rented the other moiety of the plaintiff John Gill, and Hannah his wife, as tenant from year to year. The other defendants are tenants to Wait. Wait and Ann his wife, being in possession of the estate in 1779, duly levied a fine *sur conusance de droit come ceo*, &c., of a moiety thereof; and by indenture duly declared the uses thereof to be to the use of the defendant Pearson and his heirs, in trust for J. Wait in fee. Ann Wait died above a year ago without having disposed of her share in the said estate otherwise than by the said fine and indenture, and never having had any issue. Since her death and before the day of the demise laid in the declaration J. Gill and Hannah his wife duly made an entry to avoid the said fine. The question for the opinion of the court was, Whether the lessors were entitled to all or any part of the moiety of the said estate devised to Ann Wait?

The case was argued in last Michaelmas Term.

Wood, for the lessors of the plaintiff.

Lambe, contra. *Curia adv. vult.*

Lord Ellenborough, C. J., now delivered the opinion of the court. In this case three questions have been made: 1st, Whether the conditions annexed to the estates of Ann Collett and Hannah Collett be good in point of law? 2dly, As to the effect of the residuary clause? And 3dly, Whether this ejectment can, under the circumstances of this case, be supported by one of several co-heirs? As to the first, we think that the condition is good; for according to the case of *Daniel* v.

Ubley, in Sir Wm. Jones, 137, and in Latch. 9, 39, 134, though the judges did not agree as to the effect of a devise "to a wife, to dispose at her will and pleasure, and to give to which of her sons she pleased;" Jones Justice thinking it gave an estate for life, with a *power* to dispose of the reversion among the sons; the other judges, according to his report, thinking it gave her a fee simple in trust to convey to any of her sons: yet in that case it was not doubted, but that she might have had given her a fee simple conditional to convey it to any of the sons of the devisor; and if she did not, that the heir might enter for condition broken; which estate Jones thought the devise gave, if it did not give a life estate, with a power of disposing of the reversion among the sons. And according to Latch. 37, Dodderidge said "he conceived she had the fee, with condition, that if she did alien, that then she should alien to one of her children:" and concluded his argument on this point by saying, that "her estate was a fee with a liberty to alienate it if she would, but with a condition that if she did alienate, then she should alienate to one of her sons." And in Dalison's Reports, 58, there is a case to this effect: "A devise to a wife to dispose and employ the land on herself and her sons at her will and pleasure:" and Dier and Walsh held she had a fee simple, but that it was conditional, and that she could not give it to a stranger; but that she might hold it herself, or give it to one of her sons. These cases show that the devise in question may operate as a devise on condition; for the breach of which in levying a fine to the uses within stated the heirs at law of the devisor will be entitled to enter, and the plaintiff, as one of them, will be entitled to one fourth part of the moieties whereof such fine was levied, if the residuary clause do not operate as a devise over on non-performance of the condition. And we think that the residuary clause cannot be considered as a devise over; for it does not seem to have been at all in the contemplation of the devisor to make a devise over of the share of each daughter on the breach of the condition by such daughter, but merely to dispose of those things which had not been before disposed of by the will. This brings the case to the single and only remaining question, Whether one co-heir can enter for the breach of a condition? and it seems that he may. In assize where one co-parcener enters claiming for herself and her companion, it vests the seisin in both. Brook's Abridg. tit. *Entre Congeable*, 37. Where the entry is *not* lawful, the claim of one co-parcener for herself and her companion does not vest the seisin in her companion. *E contra*, where the entry is *lawful*, *Ibid.* The entry of one co-parcener is the entry of both as to a stranger, *Ib. pl.* 38. If lands come to two in common and one enters into them generally, this shall be the entry of both, 1 Roll's Abr. 740, letter F. pl. 3. If a man devise certain annuities to his four sons out of certain lands, and devise over, that if his heir do not pay these annuities the sons shall have the land; if the annuities be not paid, and one of the sons enter generally, this shall be an entry for all the four sons in as much as they are joint tenants, *Ibid.* pl. 7.

Upon the whole therefore we think that the condition annexed to the estate devised to Ann Collett and Hannah Collett is good in point of law. That the residuary clause has no effect in this case. And that the ejectment by one of the co-heirs is good for the purpose of recovering the share of such co-heir. Judgment for one fourth of the share devised to Ann Wait.

Postea to the plaintiff.

ROSS *v.* ROSS.

CHANCERY. 1819.

[*Reported* 1 *Jac. & W.* 154.]

WILLIAM Ross, a native of Scotland, but domiciled in England, made his will, dated 5th May, 1790; containing, amongst others, the following bequest.

"I give to my son James Hislop Ross, the sum of £2000, lawful money of Great Britain, to be paid to him at his age of twenty-five years, or at any time betwixt the age of twenty-one and twenty-five, should my executors think proper so to do, and the interest thereof, in the mean time, to be applied towards his maintenance and education; and in case the said James Hislop Ross should not receive or dispose of by will or otherwise, in his lifetime, the aforesaid sum of £2000, then the said sum shall return, and be paid and payable to the heir entail, in possession of the estate of Shandwick for the time being."

The estate mentioned in this bequest, situated in the County of Ross, had previously been settled by the testator, by a deed of entail, in favor of Jean Ross, his eldest daughter.

James Hislop Ross survived the testator, and died intestate, in the year 1810, having attained the age of twenty-five years. He had not received the £2000 legacy, but in a suit instituted by Jean Ross, against the executors, to which J. H. Ross was not a party, the accounts of the testator's estate had been taken, and a sum of £1182 had been found by the master, to be the proportion payable to J. H. Ross, in respect of his legacy: this sum was accordingly carried over to his separate account, and invested in the purchase of £1891 3 per cent. annuities.

J. H. Ross being illegitimate, administration of his personal estate was, at the nomination and on the behalf of the Crown, granted to George Maule, Esq., who now petitioned for a transfer of the sum of £1891, and the dividends which had accumulated upon it.

Mr. Shadwell, for the petitioner.

Mr. Horne and *Mr. Kindersley*, for Jean Ross.

THE MASTER OF THE ROLLS. [SIR THOMAS PLUMER.] The question, I think, is, whether this will vests the absolute property of the legacy in the legatee. If it do give the absolute property, the right of disposing of it, or its devolution upon his representatives would follow

as a matter of course, unless there be something else which cuts down the gift; nothing but that, can prevent the legal consequences of property from ensuing.

It seems to me, that I cannot put an interpretation on the words of this will, by considering that it is very likely that the testator was referring to other circumstances; to the imbecility of his son, or to the effect of the Scotch law. It is probable that he may have contemplated these circumstances; but being bound to take this as the will of a domiciled English subject, I must construe it without reference to them, and determine the consequences of what appears on the face of the will itself.

Now every word he has used tends to vest the legacy. First it is given to be paid at twenty-five; if it stopped there, it would clearly be vested, the time of payment not being annexed to the substance of the gift; it then proceeds, "or at any time betwixt the age of twenty-one and twenty-five;" this was only to accelerate the payment; the executors were to pay it before the first period if they thought fit; the interest, in the mean time, is to be applied to his maintenance: another feature of vesting. If the bequest had stopped here, then, if he had died between twenty-one and twenty-five, or even during his minority, it would, according to the cases, have been vested in him; but the event renders it unnecessary to consider what would have been the consequences of his dying under age.

The legatee then acquired an absolute interest; and then comes the second part of the bequest, by means of which, you must endeavor to get it back again; you must say, that if he does not dispose of it, it is to return from him; but I do not recollect any instance of a will, where an absolute property is first given, with a condition, that if the party does not make use of it, it shall go over. But it was necessary to argue it to that extent.

This differs from a power, and a remainder over in default of its exercise: the right of disposing of the legacy is given him, not *in terminis*, but as a consequence of property. How does he acquire the power? It is not given as a power, but follows from the property being his.[1] The testator assumes that he would have a right to it at

[1] In *The Attorney-General* v. *Hall* (3d July, 1731), Fitzg. 9, 314; W. Kel. 13, the testator gave to his son and the heirs of his body, all his real and personal estate, to his and their own use; and in case his son should die leaving no heirs of his body living, he gave all and so much of his estate as his son should be actually possessed of at the time of his death to the Goldsmiths' Company, for certain charitable uses; and he directed them, not to give his son any trouble during his life concerning his estate. The son suffered a recovery of the real estate, and it was *held* by LORD CHANCELLOR KING, SIR J. JEKYLL, M. R., and REYNOLDS, C. B., that as to the personal property, "the limitation over was void, as the absolute ownership was given to Francis Hall, the son; for it is to him and the heirs of his body, and the company are to have no more than he shall have left unspent, and therefore he had a power to dispose of the whole, *which power was not expressly given him, but it resulted from his interest.*" See also *Brown* v. *Cawsens*, 2 Leon. 68; *Flanders* v. *Clark*, 1 Ves. 9; 3 Atk. 509; *Bland*

twenty-five; therefore, if he should have received it, and not have disposed of it, the capital *in solido* being his property, and remaining in his hands, was to go over to another. But if you give absolute property to a person, you cannot subject it for his life to a proviso, that if he does not spend it, his interest shall cease. One of the consequences would be, that if he had not spent it, and were to die indebted to any amount, his creditors would be excluded from it. It is quite a novel attempt to separate the devolution of property from the property itself.

WARE *v.* CANN.

KING'S BENCH. 1830.

[*Reported* 10 *B.* & *C.* 433.]

BY an order of the *Vice-Chancellor* the following case was stated for the opinion of this court: —

William Reynell, deceased, by his will, duly executed and attested for devising freehold estates, after giving specific and pecuniary legacies out of his personal estate, devised in the words following: —

"And, lastly, as to all the rest, residue, and remainder of my personal estate and lands in South Tawton and in Samford Courtenay, I give unto Richard Ware, son of Richard Ware, of North Tawton, and to his heirs forever; but if in case the said R. Ware dies without heirs, then to John Powlessland of Spreyton, and his heirs, son of Elisha Powlessland of Spreyton; or if in case the aforesaid R. Ware offers to mortgage, or suffer a fine or recovery upon the whole, or any part thereof, then to go to the aforesaid J. Powlessland and his heirs." The said J. Powlessland was a stranger in blood to the said R. Ware. The testator was at the time of making his will, and thence to and at the time of his decease, seised in fee-simple of a certain freehold estate, consisting of a farm and land, called Middle Week and Bar Week, in South Tawton, and other distinct estates in South Tawton and Samford Courtenay.

The said R. Ware having filed his bill in the High Court of Chancery against the defendant, a question has arisen in the suit upon the nature of the plaintiff's title to the premises under the said will.

The questions for the opinion of the court were,

First, What estate and interest the plaintiff took in the devised premises under the said will.

Secondly, Whether if the plaintiff were to convey a part of the estate to a purchaser in fee, the purchaser's title could be affected by the

v. Bland, Prec. in Ch. 201, *n.*, ed. Finch, and 2 Cox, 349; *Le Maitre* v. *Bannister*, Prec. in Ch. 201, *n.*; *Beachcroft* v. *Broome*, 4 T. R. 441; *Wynne* v. *Hawkins*, 1 Bro. C. C. 179; *Strange* v. *Barnard*, 2 Bro. C. C. 586; *Pushman* v. *Filliter*, 3 Ves. 7; *Bull* v. *Kingston*, 1 Mer. 314. — REP.

plaintiff's afterwards mortgaging or levying a fine, or suffering a recovery of the residue of the estate?

Thirdly, Whether if the plaintiff were to convey the whole estate to a purchaser in fee, the purchaser would have a good title to the fee against all persons claiming under the said will? The case was argued in Michaelmas Term by

Rogers, for the plaintiff.

Preston, contra.

Cur. adv. vult.

The following certificate was afterwards sent: —

This case has been argued before us by counsel. We have considered it, and are of opinion,

First, That the plaintiff took an estate in fee in the devised lands, under the will of William Reynell, with an executory devise over, to take effect upon conditions which are void in law.

Secondly, That if the plaintiff were to convey a part of the estate to a purchaser in fee, the purchaser's title would not be affected by the plaintiff's afterwards mortgaging, or levying a fine, or suffering a recovery of the residue of the estate.

Thirdly, That if the plaintiff were to convey the whole estate to a purchaser in fee, the purchaser would have a good title to the fee, against all persons claiming under the said will.

TENTERDEN. J. LITTLEDALE.
J. BAYLEY. JAS. PARKE.

DOE d. STEVENSON *v.* GLOVER.

COMMON PLEAS. 1845.

[*Reported* 1 *C. B.* 448.]

EJECTMENT by the lessee of the customary heir of Ann Stevenson claiming under the will of Mordecai Glover, the father, against Mordecai Glover, the son.[1]

Sir T. Wilde, Serjt., for the plaintiff.

Gaselee, Serjt., *contra.*

TINDAL, C. J. This case appears to me not to fall within the doctrine that has been relied on by my Brother Gaselee for the purpose of showing that the provision in the will of Mordecai Glover, the father, upon which the claim of the lessor of the plaintiff is founded, is in the nature of a condition that is repugnant to, and incompatible with, the prior absolute gift to Mordecai Glover, the son. Strictly and properly it is an executory devise, cutting down the interest which the son was to take, upon the happening of certain events, which have happened. The only question, therefore, for our consideration is, what was the

[1] The case is sufficiently stated in the opinion of the Chief Justice.

intention of the testator. Upon that point, also, the case appears to me to be free from doubt. After giving to his wife an estate for life in all his customary or copyhold and real estates, the testator proceeds: "And, from and immediately after her decease, then I give and devise all and singular my aforesaid messuages, lands, &c., unto my son Mordecai Glover, and his heirs and assigns forever, to hold to him and his heirs and assigns forever; but, in case my said son Mordecai Glover shall happen to depart this life without leaving any issue of his body lawfully begotten then living, or being no such issue, and he my said son *shall not have disposed* and *parted with* his interest of, in, and to the aforesaid copyhold estate and premises, then, and in such case, I give and devise the same customary or copyhold messuages, &c., and real estate, unto and to the use of my illegitimate daughter Ann Stevenson, and of her heirs and assigns forever." The words "parted with," which are in apposition to, seem to me to be explanatory of, the prior and more general word "dispose," and clearly to indicate a disposition or parting with the estate by the devisee, by a conveyance that was to have its complete effect and operation *in his lifetime*. If "parted with" had been the sole phrase used, it could only have been satisfied by a conveyance by a deed executed by the party in his lifetime: and, when we find the two expressions thus coupled together, I think we cannot give a more extended interpretation to the word "disposed" than the sentence would have been susceptible of if that word had not been found in it. But, even if it had rested upon the word "disposed," I should have inclined to hold, upon the principle that a will is ambulatory, and speaks only from the time of the testator's death, that a devise of the estate in question was not a *disposing* of it within the meaning of this will. The fair inference arising from the whole scope of the will tends to the same conclusion. The testator, in the first place, gives the estate to the son and to his heirs, should he have any; and he gives him full power to dispose of it in his lifetime. But he goes on to evince, in the event of his son dying and having no issue, a natural desire that the estate should go to his illegitimate daughter, provided his son's wants should not have made it necessary for him to part with it in his lifetime. And this was by no means an unreasonable mode of dealing with the property. For these reasons, I am of opinion that the plaintiff is entitled to judgment.

COLTMAN, J. I am unable to perceive any objection to the gift over in this case, as an executory devise. There is nothing in it that is repugnant to, or inconsistent with, the prior devise: nor does it operate any restraint on alienation; on the contrary, it expressly recognizes the power of the son to alien the estate during his lifetime. Then comes the question whether or not the son has disposed and parted with the estate, according to the intention of the testator. Construing those words grammatically, they clearly point to an act to be done, and to take effect, in the lifetime of the son. The words are — "in case

my said son shall not have *disposed and parted with* his interest of, in, and to the aforesaid copyhold estate and premises, then and in such case I give and devise the same customary or copyhold messuages, &c., and real estate, unto, and to the use of, my illegitimate daughter Ann Stevenson, and of her heirs and assigns forever." To what period do these words "disposed and parted with" apply? Clearly, to the time of the son's death: and at that time he had not done anything to divest the estate out of him. The construction, therefore, upon which the lessor of the plaintiff relies, is evidently the true one. And this construction leads to no incongruity or absurdity: it is a very rational and proper mode of disposing of the estate. If, as was suggested by my Brother Cresswell, the son, having no children, should wish to dispose of the estate in his lifetime, the testator leaves him at full liberty to do so; but, in the event of his not having exercised that power, and dying childless, the intention of the testator was, that his own illegitimate daughter — whom he was under a moral obligation to provide for — should have the estate, and not that the son should have power to dispose of it by will, in the manner he has assumed to do.

CRESSWELL, J. I am entirely of the same opinion. It has hardly been denied that the disposition in favor of the testator's illegitimate daughter was a good executory devise, in the first instance. There was no condition that was repugnant to, or inconsistent with, the prior devise to the son. The son might have prevented the devise over from taking effect, by disposing of the property in his lifetime. But, in the event of his not exercising that power, the estate is given over, and nothing remains for him to part with by his will.

ERLE, J. I also am of opinion that the plaintiff is entitled to judgment. The intention of the testator evidently was, to give to his son absolute dominion over the estate, provided he chose to exercise that dominion in his lifetime, but not to leave to him the selection of the object of his bounty by his will. Such appears to me to have been the intention of the testator; and I think the words he has used are incompatible with any other construction. The restriction imposed upon the power of alienation became effectual by the son dying seised. For these reasons, I am of opinion that the case of the defendant, who claims under the son's will, fails.

Judgment for the plaintiff

ATTWATER *v.* ATTWATER.

CHANCERY. 1853.

[*Reported* 18 *Beav.* 330.]

GEORGE NEWMAN, by his will, dated 18th July, 1850, bequeathed as follows: —

"Item, I bequeath to Gay Thomas Attwater, jun., eldest son of my niece, the family estate at Charlton, Wilts., to become his property on attaining the age of twenty-five years, with an injunction never to sell it out of the family; but, if sold at all, it must be to one of his brothers hereafter named."

A question having arisen as to the construction of the will of the testator, a special case was filed by Mary Anne Attwater for the opinion of the court.[1]

Mr. Townsend, for the plaintiff.

Mr. Bowring, *Mr. Whiteley*, *Mr. Marett*, *Mr. C. T. Simpson*, *Mr. Webb*, and *Mr. Jenkinson*, for the several defendants.

THE MASTER OF THE ROLLS. [SIR JOHN ROMILLY.] The question which arises on this devise is whether the restraint on alienation be valid or not. It is plain, in the first place, that the true construction of this clause cannot be to give a right of pre-emption to the brothers of Gay Thomas Attwater; and that if they do not purchase, the devisee may claim, whensoever he pleases. The meaning is, I think, plain, that the testator intended to impose this fetter: — that if the brother will not buy, the devisee was not to be at liberty to sell the property to any one. The question is, whether such a condition is a valid one? Notwithstanding the case of *Doe* d. *Gill* v. *Pearson*, 6 East, 173, this appears to me to be a condition repugnant to the quality of the estate given. It is obvious that if the introduction of one person's name, as the only person to whom the property may be sold, renders such a proviso valid, a restraint on alienation may be created, as complete and perfect as if no person whatever was named; inasmuch as the name of a person who alone is permitted to purchase, might be so selected as to render it reasonably certain that he would not buy the property, and that the property could not be aliened at all. It appears to me also, that this is the true construction of the words used by the testator; it is, in truth, an injunction never to sell the hereditaments devised at all. The words "out of the family," are merely descriptive of the effect of the sale, and not of the person to whom it might be sold, as is shown by the two last clauses of a similar character, relating to the devises to William and Edward Attwater, which, in referring to

[1] That part only of the case which relates to the restriction on alienation is here given.

this clause, state, that the property is not to be sold out of the family, as before specified.

It is not, in my opinion, desirable to impose fresh fetters on the enjoyment of property, and it appears to me, that this proviso is distinctly at variance with the rules laid down by Lord Coke, Co. Lit. 223 a, and which have always been considered and treated as good law. I am of opinion, therefore, that this clause is merely inoperative.

HOLMES *v.* GODSON.

CHANCERY. 1856.

[*Reported* 8 *De G. M. & G.* 152.]

THE LORD JUSTICE TURNER.[1] The plaintiffs in this case claim to be entitled to certain real estates devised by the will of Thomas Yates Ridley under a conveyance from Thomas Yates Ridley, the son of the testator and a devisee under his will.

The testator by his will, after giving his wife his plate and so on, proceeded thus: "I give and bequeath unto my dear wife Jane, and Richard Godson, Esq., and the survivor of them, and the executors, administrators, and assigns of such survivor, upon trust that they shall with all convenient speed call and convert into money all such parts of my residuary estate as do not consist of money or security for money, upon trust for my son Thomas Yates Ridley to vest in him on his attaining the age of twenty-one years; but in case my said son shall not live to attain a vested interest therein, then in trust for my dear wife Jane during her natural life." Then there is a disposition of books, prints, and manuscripts in favor of the son. Then there is a bequest of the advowson at Heysham in trust for the benefit of the son. Then follows this clause: "But in case my dear son Thomas Yates Ridley shall not live to attain the age of twenty-one years, or having attained the age of twenty-one years shall not have made a will, I hereby direct my said executors or trustees to sell all my property both real and personal at their discretion, and to invest the proceeds for the benefit of my said wife Jane for her natural life, and after her death all the said investment I bequeath to my friend Richard Godson, Esq." There is a codicil to the will, by which the testator devises all his property, both real and personal, to his wife and Mr. Godson to carry into effect the trusts of his will created, and to sell his real property to pay his debts or for the advancement of his son.

Now, upon the construction of this will and codicil, I think it reasonably clear that the real estates vested in the son at the age of twenty-

[1] As the opinion of TURNER, L. J., sufficiently gives the facts, the separate statement in the report is here omitted, as is also the concurring opinion of KNIGHT-BRUCE, L. J.

one years, which he attained. The testator gives all such parts of his residuary estate as do not consist of money or securities for money. Whatever doubt there might have been upon those words if they had stood by themselves as to whether they would extend beyond a disposition of the personal estate only, that doubt is, I think, removed by the ulterior clause in the will, by which the testator has said, that in case his son shall not live to attain twenty-one, or having attained twenty-one shall not have made a will, he directs his executors and trustees to sell all his property both real and personal. It is, I think, quite plain that the testator in that clause meant to dispose, in the event of the son dying under twenty-one, of the property which the son was to take if he attained twenty-one, and that the disposition extends to all the testator's property both real and personal. I think, also, that the words of the will are sufficient to vest the fee in the son upon his attaining twenty-one.

The sole question, therefore, on the plaintiff's title is, whether the fee which was thus vested in the son was defeated and the estate carried over to the widow and Mr. Godson by the event which happened of the son having afterwards died without having made a will. I am of opinion that it was not.

This is in terms a disposition of real estate in favor of other devisees in the event of a devisee in fee dying intestate, and I think that such a disposition is repugnant and void. The law, which is founded on principles of public policy for the benefit of all who are subject to its provisions, has said that in the event of an owner in fee dying intestate, the estate shall go to his heir; and this disposition tends directly to contravene the law and to defeat the policy on which it is founded. On principle, therefore, I think the disposition bad; and the cases which were cited in the argument appear to me to be conclusive upon the point.

In addition to those cases which were referred to, there is the case of *Lightburne* v. *Gill*, 6 Bro. P. C. 36, to which my learned brother has referred, and which I have before me, where there was a sum of £500 which the testator left to his daughter, to which he was entitled under a settlement, and all the rest of his worldly goods, effects, and substance real and personal to dispose of as she should think fit. But if his said daughter should die unmarried or intestate, then what was thereby left to her should go to and be equally divided among the children of his brother the Rev. Stafford Lightburne. The daughter having died intestate, the bill was filed in the Court of Chancery by the children of the brother, claiming to be entitled under the disposition over in the event of the daughter dying unmarried or intestate, and it was held that the bill could not be maintained. The bill was dismissed, there was an appeal to the House of Lords, and the House of Lords confirmed the decree dismissing the bill.

It was objected to these cases and to *Ross* v. *Ross*, 1 Jac. & W. 154, and others which I do not think it necessary to go through, and to this case of *Lightburne* v. *Gill*, that they all referred to personal

estate. But, upon this question, I confess myself unable to see the distinction between cases relating to personal and cases relating to real estate. Such dispositions of personal estate are void because they are inconsistent with the absolute interest and defeat the course of devolution which the law has provided. Upon what ground can it be held that the same principle does not reach to the like dispositions of real estate? I should feel great difficulty in maintaining such a distinction even if authority were wanting upon the point; but authority is not wanting upon it.

I may refer to the case of *Muschamp* v. *Bluet*, in Sir John Bridgman's Reports (J. Bridg. 132); although the case is not exactly in point in this case, yet I find some observations which are of great importance, as it strikes me, bearing upon the present question. There was this clause in the will: "And, as touching my lands at Tottenham, my son Matthew is joint purchaser with me of the most, and the rest of all my houses and land there which is freehold I give to Henry and Michael Lock upon this condition, that if they shall sell it to any man but to Matthew Lock my son, then he to enter upon it as of gift by this my will." The question arose first, whether the fee passed under the disposition to Henry and Michael. Cases are gone into on that subject affecting such dispositions by grant. Then the court enters into the question of the effect of this in a devise, and says: "But I agree that in case of a devise, although the apt words to make an estate of inheritance to pass are omitted" (the devise was merely to Henry and Michael without any words of inheritance), "yet, if the intent of the devisor does appear by any express matter contained in the will, an estate of inheritance shall pass, for it is sufficient to pass the inheritance. If one deviseth land to another in perpetuance, the devise by these words shall pass an estate in fee. So, if one devise land to another to give, dispose, or sell at his pleasure, this is an estate in fee-simple." Then there follows this: "But yet the law hath restrained such intent. For, first, it ought to be agreeable to law and not repugnant to it; for, although in *Scholastica's Case*, Plowd. 403, in the comment, it is said that a will is like to an Act of Parliament, yet a will cannot alter the law or make a new form of an estate, which is not allowed by the rules of law, as an Act of Parliament is, and so adjudged in the Common Bench, Hil. T. 37 Eliz., between *Jermin* and *Ascot*, Coke's Reports, in *Corbet's Case*, 1 Rep. 85 a, that by a devise a man cannot give an estate and determine part thereof by a condition and make the residue to continue. And if land be devised to one in tail he cannot determine the estate as to the devisee himself, and yet preserve the estate to the issue. And, 28 & 29 Hen. 8, Dyer (Anon. Dyer, 33), if land be devised to one in fee, and if he does not perform such an act, the land shall remain to another, the remainder is void, for no such remainder can be limited by the rules of law."

In another part of the same report there is a reference to *Baker's Case*, cited J. Bridg. 137, in which it is said, "A devise to the hus-

band and wife, with remainder to their two sons, upon condition that if they or their heirs go about to alien, &c., is a fee-simple: also for the heirs being restrained to alien, does show fully that the heir shall have the land, for otherwise he cannot alien it."

But there is another very much more important case, for which we are indebted also to the great research and knowledge which Mr. Lee has brought to our aid in the present case. I refer to the report in Serjeant Hill's manuscript, and which is really a most important case in my view of it as bearing on the present case. It is the case of *Gulliver* v. *Vaux*, 8 De G. M. & G. 167. In that case Thomas Turney was seised in fee and made his will on the 29th of December, 1712, "and therein devised the premises to Thomas Turney his second son, and his heirs, provided he should live to attain the age of twenty-one years and not otherwise, and charged the estate with £350 payable to the testator's daughter Dinah Turney at her age of twenty-four. And if his said son Thomas Turney should die before twenty-one, then he devised the premises to his eldest son Tawyer Turney and his heirs when he should attain the age of twenty-one years, and charged the estate with £550 payable to his daughter Dinah at her age of twenty-three. And if it should so happen that his son Thomas and his son Tawyer should both die before they should severally attain the age of twenty-one years, then he devised the premises to Dinah Turney and her heirs, and gives his wife the profits of the premises till her children should attain to their several ages above expressed, and after that gives her an annuity of £100 a year for life issuing out of the estate. Then follows this clause: "And for prevention of any difference which may hereafter arise concerning the inheritance of my real estate, in case it shall so happen that all my three children shall depart this life without leaving issue lawfully begotten and born of any of their bodies and without appointing the disposal of the same, then and in such case I give to Ann my wife £500 yearly over and above the £100 already mentioned, payable out of my said estate. Also I give £10 yearly to the ministers and churchwardens of Cransfield to be disposed in charitable uses. Also I give all my said lands unto my loving cousins Robert Perrott, Richard Perrott, Thomas Dell, and Robert Dell." The sons and the daughter all died under twenty-one, and all died without making any disposition of the estate and in the terms of this will without appointing the disposal of the same. The devisees, however, brought ejectment, and upon that two questions appear to have arisen: first, whether according to the true construction of the will the sons and the daughter took estates tail or estates in fee; and secondly, supposing they did take estates in fee, then, whether the executory devise over in the event of their all dying without leaving issue lawfully begotten and without appointing the disposal of the same was a good executory devise. All the judges, Lord Chief Justice Willes, Mr. Justice Abney, and Mr. Justice Burnett, agreed in opinion it was a fee in favor of the son; and then came the question, whether the

executory devise over was good. Lord Chief Justice Willes and Mr. Justice Abney delivered their opinions that the executory devise was good upon this ground, that it fell within the period allowed by law. That was the opinion which they gave in the first instance. Mr. Justice Burnett, however, agreeing that the sons and the daughter would take in fee and that the case was one of executory devise, and agreeing also that the executory devise would take effect within a limited period, addressed himself to this question, what was the effect of the clause in the will by which the executory devise was made to depend upon the sons and the daughter dying without appointing the disposal of the estate? and he expressed himself thus: "But I am clearly of opinion that this condition or contingency" (it is very important, perhaps, to observe those words) "annexed to the estate of the children, and precedent to that of the devisees' estate, is a void condition, and consequently the devise dependent on it can never take place. A condition or contingency repugnant to the estate devised must be void. Thus, a devise to one in fee upon condition that he shall not alien is void. So a devise in fee, upon condition that the wife shall not be endowed, or the husband be tenant by the curtesy, is void, because repugnant to the estate devised. So feoffment in fee, upon condition that feoffee's daughters shall not inherit, is void, because repugnant to the nature of the estate. What is the condition here? That if Thomas dies without issue, his heirs shall not take by descent but by appointment; whereas a devise to a man's heir-at-law, or grant to heirs, is void and he will take by descent. In this case, therefore, a devise in fee upon the condition that his heirs shall not take by descent unless he specially appoints them is a void condition, and consequently the devise subsisting on that condition is void." Then the case concluded thus: Lord Chief Justice Willes and Mr. Justice Abney both changed their opinion and concurred with Mr. Justice Burnett in the opinion he expressed. There cannot be a higher authority than that case, either as applicable to the present or with reference to the weight which it derives from the judges by whom it was decided.

These cases of *Muschamp* v. *Bluet*, *Gulliver* v. *Vaux*, *Ware* v. *Cann*, 10 B. & C. 433, referred to, are all cases of real estate, and they seem to me clearly to prove that, upon this point, there is no distinction between the cases relating to real and personal estate. In truth, the decisions in both cases turn, as I apprehend, on this: the law has said, that if a man dies intestate, the real estate shall go to the heir, and the personal estate to the next of kin, and any disposition which tends to contravene that disposition which the law would make is against the policy of the law, and therefore void.

In the argument of this case, great reliance was placed, on the part of the defendants, on the case of *Doe* v. *Glover*, 1 C. B. 448: but in that case the court seems to me to have proceeded upon the ground, that the devise over was not repugnant to or inconsistent with the prior devise, and the court, therefore, certainly did not intend to disturb the

previous authorities on the principle on which they proceeded. The devise was there a devise in fee, and in case the devisee should not have parted with or disposed of the same, then over. The court was of opinion that he could not, under that, dispose of it by will, but that the testator meant, unless there was a parting with or disposition of the estate by deed in the lifetime of the first devisee, the devisees over would take, and the executory devise over to them would be good. I may observe, too, that the attention of the court seems hardly to have been drawn to the point, that the devise over, as it was construed, took away the testamentary power which was incident to the fee first devised. Not one word seems to have fallen from the court or from counsel in the course of the argument as to the effect of that decision being to contravene the rule of law by which every devisee in fee has a testamentary power. But it is plain, on looking at the cases, that if a man says the estate shall go over if you do not dispose of it by deed; he says, you shall not have that power which the law gives of disposition by will. That point seems not to have been drawn to the attention of the court, and, I will venture to add that, if that case of *Doe* v. *Glover* is to be considered as conflicting with the other authorities, I think that the other authorities, and especially the case of *Gulliver* v. *Vaux*, ought to prevail against it.

Another case was referred to, *Borton* v. *Borton*, 16 Sim. 552, where the disposition was to the daughter, to be made subject to her disposition; and then there followed a power to her to dispose of the property by will. But that case proceeded entirely on the particular words of the will. The Vice-Chancellor of England evidently considered the words "to be subject to her disposition thereof," as meaning to be subject to her testamentary disposition and as referring to the ulterior power of testamentary disposition given to her. The case, therefore, depends entirely upon the particular language of the will, and without saying whether it is consistent or inconsistent with the case of *Doe* v. *Thomas*, 3 A. & E. 123, and the principle to which Mr. Justice Coleridge referred in *Doe* v. *Thomas*, it is not material to the present case.

My opinion therefore is, that the answer to this case must be in favor of the plaintiffs.

Mr. W. M. James and *Mr. C. Hall*, for the plaintiff.

Mr. W. Hislop Clarke, for Mrs. Godson.

Mr. Swanston and *Mr. C. T. Simpson*, for another defendant.

Mr. Lee as *amicus curiæ*.

IN RE MACLEAY.

CHANCERY. 1875.

[*Reported L. R.* 20 *Eq.* 186.]

THIS was a summons taken out by an intending purchaser for the opinion of the court on a question as to the vendor's title under the Transfer of Land Act (25 & 26 Vict. *c.* 53), s. 6.

Margarette Mayers, by her will, after a gift to her brother Henry on condition that he settled it on his wife and children, and the gift of a like sum to his sisters, made the following devise: —

"I give to my dear brother John the whole of the property given to me by my dear aunt Clara Perkins, consisting of the manor of Bletchingley, in the county of Surrey, and the Pendell Court Mansion, with the land belonging to it, on the condition that he never sells it out of the family."

The testatrix then gave legacies to her nephews and nieces named in the will, and after a legacy to a servant, gave the residue of her estate and effects to her "dear brothers" and "dear sisters."

John Perkins Mayers, the devisee under the will, contracted with Sir George Macleay for the sale to him of the property comprised in the devise, with a proviso that the intending purchaser should be at liberty to apply for registration of the hereditaments in the office of Land Registry, and that in the event of its being found impossible to obtain such registration, the contract should be void.

In the course of the investigation of the title a doubt arose whether a marketable title could be made to the property, having regard to the condition annexed to the devise to the vendor "that he never sells it out of the family;" and the following question was submitted to the court by the registrar under sect. 6 of the Transfer of Land Act: "Whether, having regard to the sale by the vendor, the title is such as a court of equity would hold to be a valid marketable title within the meaning of the 5th section of the Act."

Mr. Fischer, Q. C., and *Mr. Nalder*, for Sir G. Macleay, submitted the question of the validity of the condition to the judgment of the court.

SIR G. JESSEL, M. R. The question I have to decide is, whether a condition in a will containing these terms is valid in law: "I give to my dear brother John the whole of the property given to me by my late dear aunt Clara Perkins, consisting of the manor of Bletchingley, in the county of Surrey, and the Pendell Court Mansion, with the land belonging to it, on the condition that he never sells it out of the family." Then the testatrix gives certain property to nephews and nieces, naming them, and other property to her "dear brothers" and "dear sisters," who are evidently treated by her as members of her family. I have no

doubt the family in question means her blood relations. Looking at the will, I have no doubt that there is a condition annexed to the gift in fee, and that, under the word "property," the vendor will get the fee of the freehold manor in question, and mansion-house and lands, on the condition that he never sells it away from his blood relations.

First of all, it is to be observed that the condition, good or bad, is confined within legal limits; it is applicable merely to the devisee himself, and therefore is not void on any ground of remoteness. It has been suggested, however, that it is void as being repugnant to the quality of the estate, that is to say, that you cannot restrict the right of an owner in fee of alienating in any way in which he may think fit. If that were the law, the condition would be plainly void. But, with the exception of one authority, a case decided by my immediate predecessor, I am not aware that the law has ever been laid down in that way.

The law on the subject is very old, and I do not think it can be better stated than it is in Coke upon Littleton, in Sheppard's Touchstone, and other books of that kind, which treat it in the same way. Littleton says, page 222 a: "If a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is enfeoffed of lands or tenements he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason, and therefore such a condition is void." Then he says, page 223 a: "But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs or of the issues of such a one, or the like, which conditions do not take away all power of alienation from the feoffee, then such condition is good." So that, according to Littleton, the test is, does it take away all power of alienation? I think it is fair to make one remark, which is made in the case of *Muschamp* v. *Bluet*, Bridgm. 137, cited in Jarman on Wills (3d ed. vol. ii. p. 17), and adopted by Lord Romilly in the case I am going to refer to, of *Attwater* v. *Attwater*, 18 Beav. 330, that it must not, in fact, take away all power, because, if you say that he shall not alien except to A. B., who you know will not or cannot purchase, that would be in effect restraining him from all alienation, and, as is very well said in many cases, and is said in a passage in Coke to which I am about to refer, you cannot do that indirectly which you can not do directly. I had occasion to refer, in the case of *Jacobs* v. *Brett*, L. R. 20 Eq. 1, 9, to a practice which was said to prevail in the Court of Common Pleas, and where I said it never could have been considered by that court as being intended as the infringement of so salutary a rule. The condition, therefore, whatever it may be, must not really take away all power, either by express words or by the indirect effect of the frame of the condition. That is the effect of the rule as laid down by Littleton. Then Coke says, page 223 b: "If a feoffment in fee be made upon condition that the feoffee shall not enfeoff J. S. or any of his heirs, or

issues, &c., this is good, for he doth not restrain the feoffee of all his power: the reason here yielded by our author is worthy of observation. And in this case, if the feoffee enfeoff J. N. of intent and purpose that he shall enfeoff J. S., some hold that this is a breach of the condition, for *quando aliquid prohibetur fieri, ex directo prohibetur et per obliquum.*" That was Coke's notion; and I hope it has not altogether departed from our courts. Then he says: "If a feoffment be made upon condition that the feoffee shall not alien in mortmain, this is good, because such alienation is prohibited by law, and regularly whatsoever is prohibited by the law may be prohibited by condition, be it *malum prohibitum* or *malum in se*," and there he stops.

So that, according to the old books, Sheppard's Touchstone being to the same effect, the test is whether the condition takes away the whole power of alienation substantially: it is a question of substance, and not of mere form.

Now, you may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time. In all those ways you may limit it, and it appears to me that in two ways, at all events, this condition is limited. First, it is limited as to the mode of alienation, because the only prohibition is against selling. There are various modes of alienation besides sale; a person may lease, or he may mortgage, or he may settle; therefore it is a mere limited restriction on alienation in that way. Then, again, it is limited as regards class; he is never to sell it out of the family, but he may sell it to any one member of the family. It is not, therefore, limited in the sense of there being only one person to buy; the will shows there were a great many members of the family when she made her will; a great many are named in it; therefore you have a class, which probably was large, and was certainly not small. Then it is not, strictly speaking, limited as to time, except in this way, that it is limited to the life of the first tenant in tail; of course, if unlimited as to time, it would be void for remoteness under another rule. So that this is strictly a limited restraint on alienation; and unless Coke upon Littleton has been overruled or is not good law, this is a good condition.

It is said that the very point occurred in *Doe* v. *Pearson*, 6 East, 173, and *Attwater* v. *Attwater*, 18 Beav. 330, and it appears to me that the point did occur in both those cases. In *Doe* v. *Pearson* the gift was a gift in fee upon this special proviso and condition, "that in case my said daughters Ann and Hannah Collett, or either of them, shall have no lawful issue, that then and in such case, they and she having no lawful issue as aforesaid shall have no power to dispose of her share in the said estates so above given to them, except to her sister or sisters, or to their children." Now, it is to be observed that the number of alienees possible in that case was smaller than the number in this case: there it was limited to "her sister or sisters, or their children." Here

it is "family," which is a larger term. In the next place, here it is "sell" only, there it was "dispose," which is probably the largest term known to the law. So that the power of alienation was very much more restricted in *Doe* v. *Pearson* than it is in the case before me. But the full court there held, after a very long and elaborate argument, Lord Ellenborough giving judgment and going into the authorities very carefully, that the condition was good; and he says, 6 East, 180: "As to the first, we think the condition is good; for, according to the case of *Daniel* v. *Ubley*, Sir W. Jones, 137; Latch, 9, 39, 134; though the judges did not agree as to the effect of a devise," and so forth, "yet in that case it was not doubted but that she might have had given her a fee simple conditional to convey it to any of the sons of the devisor; and if she did not, that the heir might enter for the condition broken." Now that is a stronger case still; because, as Lord Ellenborough and the other judges of the Queen's Bench read *Daniel* v. *Ubley*, all the judges agreed, in the time of Sir W. Jones, that it was good to give a woman a fee simple with a condition to convey it to one of the sons of the devisor; that is, she could not convey it to anybody else; it was limited. There Mr. Justice Doderidge said, Latch, 41, "He conceived she had the fee, with condition, that if she did alien, that then she should alien to one of the children," which is a very limited class; and he finally concluded by saying that "her estate was a fee with a liberty to alienate it if she would, but with a condition that if she did alienate, then she should alienate to one of her sons." So that the case of *Daniel* v. *Ubley* is also stronger than the present. In the first place, it was a prohibition, not merely against selling, but against all alienation; and in the next place, the class was limited to one of the sons of the devisor; but yet the judges gave an opinion that it would be good, and following that old authority, Lord Ellenborough and the judges of the Queen's Bench, in *Doe* v. *Pearson*, in the year 1805, held that the condition was valid.

That being the state of the law, the matter came before my predecessor, in *Attwater* v. *Attwater*, in the year 1853, which I need not say is rather a modern time to alter the law of real property. The words there were: "Item, I bequeath to G. T. Attwater, junior, eldest son of my niece, the family estate at Charlton, Wiltshire, to become his property on attaining the age of twenty-five years, with an injunction never to sell it out of the family; but if sold at all, it must be to one of his brothers hereafter-named." There, therefore, was something more than not selling it out of the family. The "family" was restricted by the following words: "to one of his brothers." There was a definition given of the family there, — it meant his brothers; but if those words were held to mean a condition, upon which I will say a word presently, then one would have thought the rule of *Doe* v. *Pearson* would apply. I cannot see that there is much distinction between "sister or sisters and their children" and "brother or brothers;" and more particularly, bearing in mind that here it was only to "sell," and there it was to

"dispose." The case of *Doe* v. *Pearson* and a great many others were cited, and the Master of the Rolls gave a judgment in these words, 18 Beav. 336: "The next question which arises on this devise is, whether the restraint on alienation be valid or not. It is plain, in the first place, that the true construction of this clause cannot be to give a right of pre-emption to the brothers of G. T. Attwater, and that if they do not purchase, the devisee may claim whensoever he pleases. The meaning is, I think, plain, that the testator intended to impose this fetter, that if the brother will not buy, the devisee was not to be at liberty to sell the property to any one." (The words are "to one of his brothers.") "The question is whether such a condition is a valid one? Notwithstanding the case of *Doe* v. *Pearson*, this appears to me to be a condition repugnant to the quality of the estate given." He does not attempt to say that *Doe* v. *Pearson* is not law, but he says, notwithstanding it. Therefore, as I consider, he means to distinguish it. "It is obvious, that if the introduction of one person's name, as the only person to whom the property may be sold, renders such a proviso valid, a restraint on alienation may be created, as complete and perfect as if no person whatever was named; inasmuch as the name of a person who alone is permitted to purchase might be so selected, as to render it reasonably certain that he would not buy the property, and that the property could not be aliened at all." If that were so, I should altogether agree with that part of the judgment. Then he goes on: "It appears to me, also, that this is the true construction of the words used by the testator; it is, in truth, an injunction never to sell the hereditaments devised at all. The words 'out of the family' are merely descriptive of the effect of the sale, and not of the person to whom it might be sold, as is shown by the two last clauses of a similar character, relating to the devises to William and Edward Attwater, which, in referring to this clause, state that the property is not to be sold out of the family, as before specified. It is not, in my opinion, desirable to impose fresh fetters on the enjoyment of property; and it appears to me that this proviso is distinctly at variance with the rules laid down by Lord Coke, Co. Lit. 223 a, and which have always been considered and treated as good law. I am of opinion, therefore, that this clause is merely inoperative."

Now, taking that altogether, seeing that he has no quarrel with *Doe* v. *Pearson*, seeing that he takes it that Coke's assertion is good law, the key to that judgment must be found in the latter observations, where he says: "It appears to me, also, that this is the true construction of the words used by the testator; it is, in truth, an injunction never to sell the hereditaments devised at all. The words 'out of the family' are merely descriptive of the effect of the sale;" and, so read, it does not conflict with the older authorities to which I have had occasion to refer. I must consider that case, recognizing, as it does, those older authorities as being good law, to have proceeded on the particular wording of that will, and more especially on the latter clause. I do

not say that the clause does have the same effect on my mind that it had upon the mind of my predecessor; but still it is useless to criticise a question of construction when you come to the conclusion that the judge is intending not to lay down a new rule of law, but is simply construing the particular instrument before him.

Therefore I consider that the case of *Attwater* v. *Attwater* does not affect the law of the case, and that this being a limited restriction upon alienation, the condition is good.

SHAW *v.* FORD.

Chancery Division. 1877.

[*Reported* 7 *Ch. D.* 669.]

William Shaw, by his will, dated the 31st of March, 1836, devised as follows: —

"I do hereby give, devise, and bequeath unto my four sons, Thomas Shaw, John Shaw, William Shaw, and Jesse Shaw, share and share alike, all and every of those my thirteen dwelling-houses situate in Wood Street and Perry Bank, Lane End, in the parish of Stoke-upon-Trent, together with a pew in the south aisle of Lane End Church, to have and to hold subject to the following conditions. First, it is my will and desire that none of the afore-mentioned houses or lands, with the exception of my large garden in Perry Bank, be disposed of either by division, assignment, transfer, or sale, without the written consent and approbation of each and every of them my four sons, Thomas Shaw, John Shaw, William Shaw, and Jesse Shaw, their heirs, assigns, or representatives. Secondly, it is my will and desire that, if need be, the afore-mentioned garden be sold to meet contingent expenses; and furthermore, it is my will and desire that, until the before-mentioned distribution of the property is made, the rents and proceeds shall come into one common fund, and be divided equally amongst my four sons, Thomas Shaw, John Shaw, William Shaw, and Jesse Shaw, namely, at Midsummer and Christmas, first deducting all reasonable and necessary charges for the proper maintenance and good repair of the aforesaid property, which repairs are to be deducted out of the rents. Furthermore, it is my will and desire that, if there should be no lawful distribution of this my property during the natural life of them my four sons, Thomas Shaw, John Shaw, William Shaw, and Jesse Shaw, it shall then devolve to the children lawfully begotten of them my four sons. And, in case any of these my four sons should die without issue, then it is my further will and desire that the half-yearly share of the rents so possessed or intended to be possessed by them or him shall in that case devolve to the widow or widows of such deceased son or sons,

to be by them received and enjoyed so long as they retain their widowhood, and afterwards it shall devolve to the survivor or survivors of my other sons, that is to say, to my grandchildren and to their heirs and assigns, to be divided equally amongst them, share and share alike . . . And, as to all the rest, residue, and remainder of all my estate and effects whatsoever and wheresoever not hereinbefore effectually disposed of, I do hereby give, devise, and bequeath the same to be equally divided amongst my four sons, Thomas Shaw, John Shaw, William Shaw, and Jesse Shaw, share and share alike." And the testator appointed his sons Thomas Shaw and John Shaw executors of his will. The testator died in August, 1837, and his will was afterwards proved by the executors. All the four sons survived him. By a deed dated the 4th of October, 1838, and made between Jesse Shaw and Eleanor his wife of the first part, John Shaw of the second part, William Shaw of the third part, Thomas Shaw of the fourth part, and Frederick Bishop of the fifth part, and duly acknowledged by Eleanor Shaw, Jesse Shaw (with the written consent of Thomas, John, and William) granted, and Eleanor Shaw released to Bishop and his heirs, the undivided share of Jesse Shaw under the will of the testator in the thirteen dwelling-houses, with the land thereunto belonging, to hold the same unto Bishop and his heirs, to the use of Thomas Shaw, his heirs and assigns forever. And by the same deed Thomas Shaw (with the written consent of John, William, and Jesse) granted unto Bishop and his heirs all the undivided share of Thomas under the will of the testator in the same hereditaments, to hold the same unto Bishop and his heirs, to the use of Thomas Shaw, his heirs and assigns forever. William Shaw died in 1846 intestate, leaving the plaintiff George Shaw, his eldest son, and three other children him surviving. John Shaw, by his will, dated the 3d of February, 1851, devised all his real estate to trustees on certain trusts, and he died on the 4th of November, 1853. Thomas Shaw, by his will, dated the 14th of September, 1858, devised his real estate to trustees on certain trusts for the benefit of his wife and children, and he died in 1859.

The bill in the suit was filed in April, 1874, by George Shaw against grandchildren and great-grandchildren of the testator, and it prayed that the rights and interests of all parties interested in the thirteen houses, with the land attached thereto (other than the garden at Perry Bank), devised by the testator's will, might be ascertained and declared by the court; that the houses might be sold under the direction of the court, and the proceeds of sale divided among the persons interested therein according to their respective interests, or that a partition of the property might be made.

Fischer, Q. C., and *H. M. Williams*, for the plaintiff and defendants in the same interest.

Dryden, for grandchildren.

Sladen, for another grandchild.

FRY, J. The question in this case arises on the will of a testator of the name of William Shaw, and it is shortly this: whether or not a certain executory devise is valid or invalid, the plaintiff asserting its invalidity, and some of the defendants asserting its validity. [His Lordship stated the provisions of the will, and continued: —]

Now, the first question is what estate do the four sons take in this specifically devised property, before we come to that portion of the will which gives it over in the event of there being no lawful distribution? In my opinion the sons take estates as tenants in common in fee simple. I think that itis clear they take, if at all, as tenants in common, because they are to take "share and share alike." The only question which requires any attention is, whether they take for life or in fee simple. I am of opinion that the expression of the testator's desire that none of the houses be disposed of either "by division, assignment, transfer, or sale without the written consent of each and every of the four sons, their heirs, assigns, or representatives," shows that the testator considered the heirs of the four sons as having an estate in the property, which they could only have in the event of its being a fee simple estate. There is, in my opinion, a devise of this particular property to the four sons as tenants in common in fee.

Then comes the devise over which I have already read. It will be observed that the terms are, "if there should be no lawful distribution of this my property during the natural life of these my four sons," and then it is given over in a certain way the details of which I will not repeat.

Now, it is to be observed that the period during which the contingency there referred to may arise is "the natural life of the four sons," that is to say, the period of the joint lives of all the four sons. The next inquiry is, what is the nature of the event which constitutes the contingency upon which the executory devise is to take effect. It is if there is no lawful distribution of the property amongst the four sons, in other words, in the absence of a partition during their joint lives. Now the right of all the tenants in common of an estate is, if they so think fit, to enjoy it, not in severalty, but as tenants in common of an undivided estate; and therefore the contingency, in its nature, is the exercise of a right which attaches to every tenant in common of an undivided estate.

The next inquiry is, at what period is that executory devise over to take effect, if at all. The answer is that it is to take effect at the death of each of the four sons. It is quite true, as I have already pointed out, that the period during which it may arise is that of the joint lives, and therefore it will take effect with regard to the son who dies first at the very moment when the contingency is determined; but with regard to the other sons the contingency will be determined at an earlier period than their deaths, though the devise will come into operation at the death of each of them respectively.

Now that being so, I have to inquire what are the general principles

of law applicable to such a case? They may, I conceive, be stated in this way. *Prima facie*, and speaking generally, an estate given by will may be defeated on the happening of any event; but that general rule is subject to many and important exceptions. One of those exceptions may, in my opinion, be expressed in this manner, that any executory devise, defeating or abridging an estate in fee by altering the course of its devolution, which is to take effect at the moment of devolution and at no other time, is bad. The reason alleged for that is the contradiction or contrariety between the principle of law which regulates the devolution of the estate and the executory devise which is to take effect only at the moment of devolution, and to alter its course. I am not bound to inquire into the logical sufficiency of the reason given, because it appears to me that the exception is well established by the cases of *Gulliver* v. *Vaux*, 8 D. M. & G. 167, *n.*; *Holmes* v. *Godson*, Ibid. 152; and *Ware* v. *Cann*, 10 B. & C. 433. Another exception to the general proposition which I have stated is this, that any executory devise which is to defeat an estate, and which is to take effect on the exercise of any of the rights incident to that estate, is void; and there again the alleged reason is the contrariety or contradiction existing between the nature of the estate given and the nature of the executory devise over. A very familiar illustration is this, that any executory devise to take effect on an alienation, or an attempt at alienation, is void, because the right of alienation is incident to every estate in fee simple as to every other estate. Another illustration of the same principle is that which arises where the executory devise over is made to take effect upon not alienating, because the right to enjoy without alienation is incident to the estate given. Now that exception is fully justified by the cases of *Bradley* v. *Peixoto*, 3 Ves. 324; *Ross* v. *Ross*, 1 Jac. & W. 154; and *In re Yalden*, 1 D. M. & G. 53. It is true that in some of the earlier cases, such as *Doe* v. *Glover*, 1 C. B. 448, and *Watkins* v. *Williams*, 3 Mac. & G. 622, a distinction was taken between realty and personalty, but that was overruled in *Holmes* v. *Godson*, and it never had anything in the nature of principle or reason to support it. I think, therefore, that these exceptions to the general rule are well established.

That being so, it only remains to be observed that the executory devise in the present case is within both of these exceptions. It is within the first, because, as I have pointed out, although the period during which the contingency is to be determined is that of the joint lives of the four sons, the time at which the devise over is to take effect is the death of each of the sons, that is, the moment when the estate devolves. It takes effect at the moment of devolution, but at no other time, and altering, as every executory devise must alter, the course of devolution, it is bad upon that ground. It is equally bad under the second exception, because the event upon which it is to take effect is the exercise of a right which is incident to the estate in fee simple already given to the tenants in common, namely, the right to enjoy

without alienation. It is bad as being a gift over upon the exercise of that right.

For these reasons I hold that the plaintiff's contention is correct. I make a declaration to the effect that the devise over is bad, and that the four sons took estates as tenants in common in fee simple. There will be a decree for sale and distribution of the fund.[1]

IN RE ROSHER.

CHANCERY DIVISION. 1884.

[*Reported* 26 *Ch. D.* 801.]

SPECIAL CASE.

J. B. Rosher, by his will, dated the 26th of November, 1872, devised as follows: —

"I devise all my manor, commonly called Trewyn Manor, and all other my real estate, unto my said son Jeremiah Lilburn Rosher, his heirs, executors, administrators, and assigns, according to the tenure thereof respectively. Provided always, and I hereby declare that if my said son, or his heirs or devisees, or any person claiming through or under him or them, shall desire to sell my manor and estate of Trewyn, and other my estates in the counties of Monmouth and Hereford, or any part or parts thereof, in the lifetime of my wife, she shall have the option to purchase the same at the price of £3000 for the whole, and at a proportionate price for any part or parts thereof, and the same shall accordingly be first offered to her at such price or proportionate price or prices. And I also declare that if my said son, his heirs or devisees, or any person claiming through or under him or them, shall during the life of my said wife desire to let Trewyn House, garden, buildings, land, and premises, or any part or parts thereof, now in my occupation, for a longer period than three years at any one time, she shall have the option of renting the whole of the lastly described premises for any period exceeding three years as she shall desire, at the yearly rent of £25, and the same shall be first offered to her accordingly; and that if my said son, his heirs or devisees, or any person claiming through or under him or them, shall during the life of my said wife desire to let Lower Trewyn, or any part or parts thereof, for a longer period than seven years at any one time, she shall have the option of renting the whole of the said Lower Trewyn for any period exceeding seven years as she shall desire, at the yearly rent of £35, and the same shall be first offered to her accordingly."

The testator died on the 26th of November, 1874. This action was brought by the widow against the son. The special case was stated by

[1] See *Welsh* v. *Woodbury*, 144 Mass. 542 (1887).

consent for the opinion of the court, pursuant to Order XXXIV. of the Rules of Court of 1875.

The case stated that the real selling value of the manor and estate of Trewyn, and other the estates of the testator in the counties of Monmouth and Hereford, was, at the date of the will and at the time of the testator's death, £15,000 and upwards; that the real letting value of Trewyn House, garden, buildings, land, and premises, was, at the date of the will and at the time of the testator's death, £100 and upwards per annum; and that the real letting value of Lower Trewyn was at the date of the will and at the time of the testator's death £100 and upwards per annum.

The questions for the opinion of the court were: —

(1) Whether or not, according to the true construction of the will, the son was entitled to sell or to mortgage or charge respectively the estates devised to him by the will, or any part thereof, without first offering to the widow the option to purchase the premises so intended to be sold or to be mortgaged or charged at the price named in the will, or at a proportionate price, according to the quantity dealt with, as the case might be, or whether the provisions and directions contained in the will in reference to the option of purchase were null and void?

(3) Whether or not, according to the true construction of the will, the son was entitled to let the premises called Trewyn House, or any part thereof, for a longer term than three years, or the premises called Lower Trewyn, or any part thereof, for a longer period than seven years, without first offering to the widow the option of renting the same respectively as directed by the will at the respective rents named therein, or whether the provisions and directions in the will contained in reference to the letting of the said premises or either of them were void and of no effect?

Barber, Q. C., and *Dauney*, for the widow.

Cookson, Q. C., *Goddard H. Orpen*, and *A. B. Walford*, for the son.

PEARSON, J., after stating the facts, continued: —

The question I have to decide is whether, there being an absolute devise in fee simple to the son, the conditions annexed to it are valid. I will deal first with the condition which relates to selling, and it will, I hope, shorten the observations which I have to make if I first state the manner in which I interpret this condition.

The restriction upon selling is this, that if the son, or any person claiming through or under him, is minded to sell during the lifetime of the testator's widow, the estate intended to be sold, whether it is the whole or only part of the devised estates, must be offered to the widow at the price of £3000 for the whole, or at a proportionate price for a part. It is agreed that the value of the whole estate at the death of the testator was £15,000. It is, therefore, in effect a condition that, if the son desires to sell, he shall offer the estates to the widow, and that she is to be at liberty to buy them at one-fifth of their value. I consider

that (and I mean to decide the case upon that conclusion) as an absolute restraint against sale during the life of the widow. I mean to treat it as if it had been, "during the life of the widow you shall not sell," because to compel him, if he does sell, to sell at one-fifth of the value, and to throw away four-fifths of the value of the estate is, to my mind, equivalent to a restraint upon selling at all. And I think there is authority for that conclusion, for in *Bragg and Tanner's Case*, 19 Jac. 1; Sheppard's Touchstone, 7th Ed. vol. i. p. 130, it was held by Justices Dodridge and Chamberlain, that if a feoffment be on condition that if the feoffee alien he shall pay £10 to the feoffor, this is a good condition; but the Chief Justice and Haughton, J., held the contrary, for then this shall be a circumvention of the law. And in *Billing* v. *Welch*, I. R. 6 C. L. 88, that case is thus referred to in the judgment of the Court of Queen's Bench, delivered by Mr. Justice O'Brien, I. R. 6 C. L. 101. "The author (Sheppard) then refers to a case in which Dodridge and Chamberlain, JJ., held, that if a feoffment be on condition that if the feoffee alien he shall pay £10 to the feoffor, the condition would be good; but in which case the Chief Justice and Haughton, J., held the contrary, on the ground that this would be a 'circumvention of the law.' In our opinion, the ruling of the Chief Justice and Haughton, J., was the correct one. If a covenant be held good which, in the event of a grantee in fee simple aliening the land, merely imposes a fine upon him (or an additional rent on the lands, as in the case before us) the general rule might be evaded and the principles of it violated by fixing such an amount of fine or additional rent as would effectually prohibit the alienation, which would clearly be a 'circumvention of the law.'" To my mind, to compel the son in the present case, if he chose to sell, to sell at one-fifth of the value of the estate, is really a prohibition of alienation during the widow's lifetime. The question, then, which I have to determine is this, is it or is it not the law that to a devise in fee simple you may annex a condition that during a limited period the devisee shall not sell at all?

Now, in order to determine this question we must go back to that which is to a great extent the fountain-head of the English law, I mean Coke upon Littleton. There it is said (Co. Lit. sec. 360): "Also if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void; because when a man is enfeoffed of lands or tenements (*pur ceo que quant home est enfeoffe de terres ou tenements*) he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason; and therefore such a condition is void." And Mr. Charles Butler, in a note to sect. 362, says: "A power of suffering a common recovery, and of levying a fine within the Statutes of 4 Hen. 7, and 32 Hen. 8, is so inseparably inherent to the estate of a tenant-in-tail, that any condition or proviso restraining or prohibiting it, is held to be repugnant to the nature of the estate, and therefore void. But it does not

vitiate the grant of the estate tail to which it is annexed; because (to use an expression of Lord Hobart) a condition annexed to an estate given is a divided clause from the grant, and therefore cannot frustrate the grant preceding it, neither in anything expressed, nor in anything implied, which is, of its nature, incident to and inseparable from the thing granted." I conceive, therefore, that Mr. Charles Butler, on the same ground, must have said that the power of sale is a thing incident to and inseparable from an estate in fee simple, and that a condition against selling annexed to such an estate is absolutely void. But I think Lord Coke's observations in *Mary Portington's Case*, 10 Rep. 35 a, 38 b, make the matter still plainer. He says: "And it was well observed in this case. That to an estate tail there are three manner of incidents; some by the common law, others by Act of Parliament, and some by custom. By the common law such as are not restrained by the Statute and cannot be restrained by any condition, as dower and tenancy by the curtesy after issue, are incident to an estate tail, and cannot be restrained by condition. Also the estate of him, and of tenant in tail after possibility, are dispunishable of waste, so a collateral warranty is a bar to an estate tail, and a common recovery also, and none of these can be restrained by any condition or limitation. By Statute law, as to make leases by the Statute of 32 Hen. 8, *c.* 28, and to levy a fine by the Statute of 4 Hen. 7, *c.* 24, and 32 Hen. 8, *c.* 36, to bar issues, and none of these which are incidents to his estate by Act of Parliament may be restrained by condition: for when a man makes a gift in tail, he *tacite* gives these incidents to it; and therefore to restrain them by condition or limitation would be repugnant. For suppose that a man makes a gift in tail, and further grants that he may make leases for years or lives according to the said Act; or to levy a fine with proclamations according to the Acts in such case to bar his issues; provided always that he shall not make leases or levy a fine; none will deny but such proviso would be repugnant; and by consequence in the other case, when such incidents are tacitly implied; for *expressio eorum quæ tacite insunt nihil operatur*." And so in the case of a devise in fee simple, if I may translate it adapting this illustration of Lord Coke's, "I devise Black Acre to A. and his heirs, in fee simple, and I give him power to mortgage, lease, or sell the estate, or any part or parts thereof, from time to time, and at all times or at any time, in any market, to any person or persons, upon such conditions or terms as he shall from time to time in his own absolute will and pleasure determine. Provided always, that he shall not sell either during his own life or during the life of B." I think, when you write out the devise in full in that way, every one would say that the condition is repugnant to the grant which has been previously made, and, of course, if the matter had stopped there, there would have been no difficulty whatever in this case. The question to be determined would have been simply whether the condition was in whole or in part repugnant to the gift to which it was annexed, and if so, it would necessarily be void.

But it is impossible to shut one's eyes to the fact that some exceptions at all events have been made to this general law. The general law seems to me to stand upon principles about which there can be no doubt, and which are easily intelligible. But in the very next section of Littleton, sect. 361, there is this: "But if the condition be such, that the feoffee shall not alien to such an one, naming his name, or to any of his heirs, or of the issues of such an one, &c., or the like, which conditions do not take away all power of alienation from the feoffee, &c., then such condition is good." I confess I am absolutely at a loss to understand how that exception arose, because it is plainly just as much repugnant to the gift as any other condition would be, for the implied power given to alien to any person or persons he pleases includes a liberty to alien to J. S., if he chooses to do so. It seems to me that, unintentionally and unwittingly, another principle has been applied here (forgetting entirely that the question whether a condition was good or bad should be determined by its repugnancy to the prior gift), and that the question of policy has been allowed to intervene, omitting altogether all considerations of repugnancy. Just as a general restraint of marriage was always held to be bad, but a restraint of marriage to one particular individual was held to be good, so, in the same way, although a restraint of alienation in general was decided to be bad, it seems to have been thought that a restraint of alienation to one individual or his issue was not bad. I confess I wish that the law had been allowed to stand on the simple question of repugnancy, because then there would have been no uncertainty and no confusion. In *Muschamp* v. *Bluet*, Sir J. Bridg. 132, an attempt was made to introduce a converse condition, that is, a condition that the devisee should alien only to one individual named, and that was held to be bad. But it is impossible not to see that, although that was held to be bad, the principle of the decision has certainly been departed from in later times; I refer to those cases which led up to *In re Macleay*, Law Rep. 20 Eq. 186, before Sir George Jessel, M. R. There are two older cases, viz., *Daniel* v. *Ubley*, Sir W. Jones, 137, and *Doe* v. *Pearson*, 6 East, 173. Those cases were followed by *Attwater* v. *Attwater*, 18 Beav. 330, before Lord Romilly, M. R., and, finally, by *In re Macleay*, upon which I shall have to make some observations. They do not actually meet the present case, because they were not cases of restraint of alienation for a limited time as this is, but of restraint of alienation except to a particular class of persons, and the question was whether the condition was within the rule as being repugnant to the gift. In *Daniel* v. *Ubley* the devise was, "I give and bequeath to Agnes, my wife, my house, &c., to dispose at her will and pleasure, and to give to such of my sons she thinks best." It appears that Jones, J., thought that the wife had an estate for life, with power to dispose of it at her pleasure during her life, and a power to give the reversion to any one of the sons of the devisor. If that is really a correct translation of the devise, — that the widow took merely an estate for life, with a power to appoint the estate in reversion to any

of the sons, I need not say that *Daniel* v. *Ubley* would not touch the present question at all, and I cannot help thinking that, if *Daniel* v. *Ubley* were to be decided at the present day, the opinion which was expressed by Mr. Justice Jones would be held to be substantially right. But it is impossible to ignore the fact that different judges have taken different views.

I will now read from the judgment of Sir G. Jessel, M. R., in *In re Macleay*, Law Rep. 20 Eq. 186, 190, because it is sufficient for me to refer to what he there quotes from these cases. He cites Lord Ellenborough in *Doe* v. *Pearson*, 6 East. 173; and Lord Ellenborough says, "For, according to the case of *Daniel* v. *Ubley*, though the judges did not agree as to the effect of the devise, yet in that case it was not doubted but that she might have had given her a fee simple conditional to convey it to any of the sons of the devisor; and, if she did not, that the heir might enter for the condition broken." Now that is a stronger case still, because, as Lord Ellenborough and the other judges of the Queen's Bench read *Daniel* v. *Ubley*, all the judges agreed in the time of Sir W. Jones that it was good to give a woman a fee simple with a condition to convey it to one of the sons of the devisor; that is, she could not convey it to anybody else; it was limited. The Master of the Rolls continues, Law Rep. 20 Eq. 191, "There Mr. Justice Dodridge, Latch. 37, said, 'He conceived she had the fee, with condition, and if she did alien, that then she should alien to one of the children,' which is a very limited class; and he finally concluded by saying that 'her estate was a fee, with a liberty to alienate it if she would, but with a condition that if she did alienate, then she should alienate to one of her sons.'" With all respect to the memory of Mr. Justice Dodridge I think that sentence shows that the two parts of the gift are about as repugnant as could well be. He first says that the estate was in fee, with liberty to her to alienate if she would, and then follows, "but with a condition that if she did alienate then she should alienate to one of her sons." How the two could co-exist I honestly say I cannot understand. Then Sir G. Jessel, M. R., says, Law Rep. 20 Eq. 190, "in *Doe* v. *Pearson* the gift was a gift in fee upon this special proviso and condition, 'That in case my said daughters Ann and Hannah Collett, or either of them, shall have no lawful issue, that then and in such case, they and she having no lawful issue as aforesaid shall have no power to dispose of her share in the said estates so above given to them, except to her sister or sisters, or to their children.' Now it is to be observed that the number of alienees possible in that case was smaller than the number in this case; there it was limited to 'her sister or sisters, or their children.' . . . So that the case of *Daniel* v. *Ubley* is also stronger than the present. In the first place, it was a prohibition, not merely against selling, but against all alienation; and in the next place, the class was limited to one of the sons of the devisor; but yet the judges gave an opinion that it would be good, and following that old authority, Lord Ellenborough and the judges of the Queen's Bench, in *Doe* v. *Pearson*, in the year 1805, held that the condition was valid."

I ask myself, and with all respect I hope for the learned judges who decided those cases, what was the principle upon which they went, and how by any possibility that principle is to be applied to other cases in the future? In *Daniel* v. *Ubley* the widow was to alienate to one of her sons; in *Doe* v. *Pearson* the discretionary power of alienation was limited "to her sister or sisters, or their children." What am I to say is the principle? Is it that there may be a condition that, if you alienate, you must alienate to a member of your own family, or that you must look to the number of the individuals to whom the alienation is permitted, or when there are a number of individuals (not knowing at the present moment what that number may be), am I to inquire whether they are able, or likely to be willing, to purchase the property to which the condition is attached? If they are able and willing to purchase the property, am I to say that the condition is good, and if from their poverty they are unable, or from other circumstances are unwilling, am I to say that the condition is bad? It seems to me that the adoption of any such rule as that would produce the greatest uncertainty and confusion; in fact it would be absolutely impossible for any judge to apply such a rule to any case which might come before him, unless the facts of the case were absolutely identical with those of some previously decided case.

In *Attwater* v. *Attwater*, no doubt, Lord Romilly challenged the correctness of the decision in *Doe* v. *Pearson*. In *In re Macleay* Sir G. Jessel, M.R., thought that, as *Doe* v. *Pearson* was decided in the year 1805, it was too late to go contrary to it, and, having in *In re Macleay* a devise which was very similar to that in *Doe* v. *Pearson*, he followed what he conceived to be the rule in *Doe* v. *Pearson*, and decided that the condition in *In re Macleay* was a valid condition. If there were nothing else in *In re Macleay* I do not think I need have discussed it any further, because the condition with which I have now to deal is not like the conditions in any one of the cases to which I have referred. But, no doubt, there are some observations of the Master of the Rolls in *In re Macleay* which were very strongly and very properly relied upon by Mr. Barber, because the authority of Sir G. Jessel is very great. I cannot possibly ignore those observations, and I feel bound to take exception to them, for I cannot agree with the propositions which they lay down. After citing those sections from Littleton to which I first referred, and also referring to *Muschamp* v. *Bluet*, Sir G. Jessel, M.R., says, Law Rep. 20 Eq 189: "So that, according to the old books, Sheppard's Touchstone being to the same effect, the test is whether the condition takes away the whole power of alienation substantially: it is a question of substance and not of mere form." I apprehend that the meaning of the word "substantially" is this: Does it really deprive the devisee of the power of alienation, or does it only so restrain it that in effect he still has the power of alienation? If the latter it is good. The Master of the Rolls continues: "Now, you may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation

by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time. In all those ways you may limit it, and it appears to me that in two ways, at all events, this condition is limited. First, it is limited as to the mode of alienation, because the only prohibition is against selling. There are various modes of alienation besides sale; a person may lease, or he may mortgage, or he may settle; therefore it is a mere limited restriction on alienation in that way. Then again, it is limited as regards class; he is never to sell it out of the family, but he may sell it to any one member of the family. It is not, therefore, limited in the sense of there being only one person to buy; the will shows there were a great many members of the family when she made her will; a great many are named in it; therefore you have a class which probably was large, and was certainly not small. Then it is not, strictly speaking, limited as to time, except in this way, that it is limited to the life of the first tenant in tail; of course, if unlimited as to time, it would be void for remoteness under another rule. So that this is strictly a limited restraint on alienation, and unless Coke upon Littleton has been overruled, or is not good law, this is a good condition." With all deference to Sir G. Jessel, I do not find in Coke upon Littleton that which he seems to have found, and I must say this, that when you refer to Coke upon Littleton, with all deference to that learned judge, one must bear in mind that he was not always consistent with himself. I find, for instance, this, Co. Lit. 223 b: "And yet if a man make a gift in tail, upon condition that he shall not make a lease for his own life, albeit the estate be lawful, yet the condition is good, because the reversion is in the donor." When, however, I turn to *Sir Anthony Mildmay's Case*, 6 Rep. 43 a, I find this: "So if a man makes a gift in tail, on condition that he shall not make a lease for his own life, it is void and repugnant." I find also this, Co. Lit. 223 b: "If a man make a gift in tail, upon condition that he shall not make a lease for three lives, or twenty-one years, according to the Statute of 32 Hen. 8, the condition is good, for the Statute doth give him power to make such leases, which may be restrained by condition, and by his own agreement; for this power is not incident to the estate, but given to him collaterally by the Act, according to that rule of law, *quilibet potest renunciare juri pro se introducto*." And in *Mary Portington's Case*, 10 Rep. 39 a, there is this: "For suppose that a man makes a gift in tail, and further grants, that he may make leases for years or lives according to the said Act; or to levy a fine with proclamations according to the Acts in such case to bar his issues; provided always, that he shall not make leases, or levy a fine; none will deny but such proviso would be repugnant; and, by consequence, in the other case, when such incidents are tacitly implied" — that is, whether the incidents are mentioned or not, you cannot make a condition of that kind. I think, therefore, Lord Coke must be read with a certain amount of caution, and I may say that, if any one will take the trouble to read two or three passages in Sheppard's

Touchstone, he will find that the learned professors of the law are perpetually at loggerheads as to what is a good condition, and the reason is that they have departed from the first principle, that a condition which is repugnant to a gift is a void condition, and the exceptions have been made without any principle at all, and it is therefore perfectly impossible to say by any rule what exceptions are good and what are bad.

I should be very sorry to do Sir George Jessel any injustice, and I must honestly say that in attempting to criticise so able and learned a judge I am always afraid of falling into some error myself, and I am not quite certain that I understand correctly the extent to which in those passages he means to go. If he means to assert that, provided you give a power to mortgage or lease, you may restrain the power to sell, all I can say is, that I most respectfully differ from him, and I cannot understand how, after he had cited the maxim from Coke which he had quoted, he should have tried to lay down any such doctrine. Applying what he says to the present case, does he mean that, the estate being worth £15,000, although there is a restriction against selling, the son might immediately mortgage it for £15,000, or might lease it for 999 years? I can only say that it seems to me that both those things are hit by the maxim which he quotes with the greatest approbation, *quando aliquid prohibetur fieri, ex directo prohibetur et per obliquum :* and that this would be an infringement of any such condition is proved (if proof were wanting) by *Large's Case*, 3 Leon. 182, where, there being a gift to a son with a condition annexed to it that he was not to alienate within a particular time, he having granted four leases for sixty years to begin one after the other, it was held that they came within the prohibition. And in any case, if you are to hold that, though there is a prohibition of sale in the ordinary sense of the word "sale," still you may dispose of the estate in any other way, the condition so construed to my mind would be an absurd one ; and, if not absurd, I am perfectly satisfied that the court would never allow advantage to be taken of it because something had been done in one way which might have been done effectually in another way.

It still remains for me to consider whether there is any decision that a condition absolutely restraining alienation is good if there is a limitation as to time, because, although I have dealt with these cases in order to clear the way with regard to the foundation upon which all the exceptions rest, still, as I hold that the exceptions stand on a principle absolutely removed from that of repugnancy, there may yet exist an exception which can be made to the condition, and which will be good by reason of a limitation of time.

The authority cited to show that this is so is *Large's Case*, 2 Leon. 82 ; 3 Leon. 182. I am going to cite it from the American case, *Mandlebaum* v. *McDonell*, 18 Amer. Rep. 61, 80, which contains a very elaborate and able judgment upon this part of the case. The very same point which arises now arose then before the American court.

The judgment of the American court refers to *Large's Case* thus: "As reported, the same devise is stated as follows: — 'A., seised of lands in fee, devised the same to his wife till William, his younger son, should come to the age of twenty-two years, the remainder when the said William should come to such age, of his lands in D., to his two sons, Alexander and John, the remainder of his lands in C. to two other of his sons, upon condition, *quod si aliquis dictorum filiorum suorum circumibit vendere terram suam*, before his said son William should attain his said age of twenty-two years, *in perpetuum perderet eam*.'" It seems to have been held by the text-writers that this therefore was a condition attached to a devise, not to sell within a limited time, and that that condition was good, because it was held that one of the sons, who had gone about to grant leases for terms of sixty years in succession, had broken the condition, and that the breach of the condition might be taken advantage of. But Mr. Justice Christiancy points out, I think with perfect accuracy, that when you come to look at the case there was no devise of the fee simple of that kind. There was only a contingent remainder limited to the son, upon condition that before he came into possession, that is to say, before he attained twenty-two, he should not sell. That being so, the son having sold before that time, it was held that he could not qualify himself to take under the contingent remainder, that the contingent remainder therefore failed altogether, and the estate passed away from him. Now the first citation of this case which deals with it as if it had decided that a limitation as to time made a condition of this kind good, is in a note in the 7th edition of Sheppard's Touchstone, page 130 (it is not in Sheppard's Touchstone itself). The note originally ran thus: "And the grantee may be also restrained from alienating for a particular time: *Large's Case*." Then Mr. Preston adds in brackets, "Being a reasonable time; not trenching on the law against perpetuities," and the note thus inserted in Sheppard's Touchstone has no doubt been copied into a good many other text-books. But there has been no judicial decision to that effect; and it is a very curious thing that, although Littleton's book is more than 400 years old, and although Lord Coke died 250 years ago, there is not a single judicial decision to be found in the books showing that a limitation as to time added to such a condition makes it a valid condition. I perfectly admit that although there has been no such judicial decision, yet if I could find that this had been an accepted *dictum* of law, and that it was likely to have affected divers contracts and dealings between man and man, and that by not following it I should be disturbing anything which had been done in former times over and over again on the faith of the *dictum*, I should feel myself bound by it and I should decline to decide in opposition to it. I hold most strongly that what the present Master of the Rolls (then Brett, L. J.) said in *Lohre* v. *Aitchison*, 3 Q. B. D. 558, 561, in regard to policies of insurance, ought to be applied to all doctrines affecting conveyances. He said: "The dispute thus raised is one with regard to the mode of ascertaining the amount of

a loss under a policy in ordinary form, and of adjusting that amount when ascertained. Such disputes have for a long period been determined according to recognized rules. As many of the arguments presented to us seemed to trench violently on several of those rules, it appears to us advisable to state our view of the binding force of those rules, and the reasons why they have a binding and exclusive force. They are rules which originated either in decisions of the courts upon the construction or on the mode of applying the policy, or in customs proved before the courts so clearly or so often as to have been long recognized by the courts without further proof. Since those decisions and the recognition of those customs, merchants and underwriters have for many years continued to enter into policies in the same form. According to ordinary principle, then, the later policies must be held to have been entered into upon the basis of those decisions and customs. If so, the rules determined by those decisions and customs are part of the contract. And though a court now might differ from the correctness of the rules as originally laid down, it must yet now act upon those rules as parts of the contract, or as agreed modes of carrying it out." I think it would be exceedingly mischievous to attempt to alter any rule which had been adopted and acquiesced in for more than a century. But in the present case I am bound to say that I cannot imagine that this supposed rule has ever been acted upon, because, to begin with, it is so vague that I am perfectly certain that no counsel capable of advising a client would have advised his client to act upon it without better information than we possess at present as to what the rule means. What is the meaning of "a reasonable time"? Does it extend, as Mr. Preston thinks, to a time so long that it does not trench on the law against perpetuities? Does it simply extend to the life of the individual himself, or to the life of some other person, or is it to be applied in different cases according to the circumstances of each case? Is each judge before whom the question comes to decide whether the time mentioned in the particular condition is a reasonable time, or is it to depend upon some other unknown quantity which this court has yet to decide? I find that the original rule which says that you cannot annex to a gift in fee simple a condition which is repugnant to that gift is a plain and intelligible rule. So far as I can find that any exception to the rule has been laid down and judicially decided, I am bound by that exception. But I will not add other exceptions for which I can find no authority, and the addition of which, to my mind, will only introduce uncertainty and confusion into the law which we have to administer. I must therefore, as regards the condition which relates to selling, declare that it is void.

I have now to deal with the condition as to leasing. It is agreed that the real leasing value of both the properties was $100 per annum. I will assume in favor of the condition that it does not enable the widow to require an indefinite lease, I mean a lease for 999 years or for a very long period, but that the utmost she could require would be a lease for

the period of her own life. I think, nevertheless, that the same principle applies to the power of leasing as to the power of sale, and for the reasons before given, because the power to lease is just as much an incident to an estate in fee simple as the power to sell; and inasmuch as the restriction amounts to this, that the widow is to have a lease at one-fourth of the real rent, I think that it is an absolute restriction in the one case upon leasing for more than three years, and is void. The condition as to leasing the other property is practically the same, and is void for the same reason. I must, therefore, answer the questions by saying that both the restriction upon the power of selling and the restriction upon the power of leasing are invalid.

IN RE DUGDALE.

CHANCERY DIVISION. 1888.

[*Reported* 38 *Ch. D.* 176.]

ELIZABETH DUGDALE, who died in 1866, by her will dated in 1865, devised and appointed certain real and personal estate "upon trust for my third son, James Boardman, his heirs and assigns; but if my said son, James Boardman, should do, execute, commit or suffer any act, deed or thing whatsoever whereby or by reason or in consequence whereof, or if by operation of law, he would be deprived of the personal beneficial enjoyment of the said premises in his lifetime, then and in such case the trust hereinbefore contained for the benefit of my said son, James Boardman, shall absolutely cease and determine, and the estates, hereditaments, money and premises hereinbefore limited in trust for him, and also any and every other share of property, real and personal, which may survive or accrue to him under the trusts of this my will, and whereof, by reason or in consequence of any such act, deed or thing as aforesaid, or by operation of law, he would be deprived in his lifetime of the personal beneficial enjoyment, shall go and be held in trust" for his wife, or, if no wife then living, for his children equally, their heirs, executors, administrators, and assigns, and if there should not be any wife or child living, then, during so much of his life as there should be a want of any such wife or child, the rents and income should be accumulated for the benefit of any future wife or children, and so much as could not legally be accumulated should be paid to the persons who under the trust thereinafter declared would be entitled thereto if James Boardman was not living; "and if he shall die without leaving any issue of his body him surviving, the estates, hereditaments, money and premises hereinbefore limited in trust for him, with any and every such surviving or accruing share as aforesaid, shall go and be held in trust for" such of the testatrix's other issue as he

should by deed or will appoint, and in default, in trust for her other children equally, their respective heirs, executors, administrators, and assigns; and the testatrix declared that each of her sons should during the continuance of the trust thereinbefore contained for his benefit respectively have the letting and full management of the hereditaments limited in trust for him without the intervention of the trustees.

The will had previously contained similar provisions for two other sons of the testatrix.

James Boardman Dugdale survived his mother, and was a bachelor. This was an originating summons taken out by him against the testatrix's other children or their representatives, and the trustees of the will, claiming a declaration that he was entitled absolutely to the property devised and appointed to him, upon the ground that the executory devise over was repugnant and void.

Farwell, for the plaintiff.

A. J. Chitty, for the defendants.

Kay, J. (after reading the gift, continued) : —

James Boardman Dugdale claims this property upon the ground that the executory devise which I have read is repugnant and void.

There is no doubt that a condition against alienation is void: Co. Lit. 223 a.

The difference between a condition, properly so called, and a conditional limitation or an executory devise is that, in the case of a condition, the estate is to revert to the grantor or his heirs; in the other cases it is limited over to other persons. But even in the case of a condition the power of alienation may be restricted, though it cannot be entirely taken away. For example, a condition not to alien "to such an one, naming his name, or to any of his heirs, or of the issues of such a one, &c., or the like, which conditions do not take away all powers of alienation from the feoffee, &c., then such condition is good." Lit., sect. 361.

It has been said that a total restriction of alienation for a limited time may be good. During the argument in *Churchill* v. *Marks*, 1 Coll. 441, 445, an eminent conveyancer, in answer to a question put to him by the court, stated his opinion to be, that a gift to A. in fee, with a proviso that if A. aliens in B.'s lifetime the estate shall shift to B., is valid.

Such a limitation might not deprive A. altogether of the power of alienation, because he might outlive B., and after B.'s death his power of alienation would not be interfered with. But it is to be observed that there is no decision to this effect, and the late Mr. Waley in a note, p. 88, of the 2d edition (p 111, 3d edition), 3d vol. of Davidson's Conveyancing, to which my attention has been called, states his opinion that this doctrine is doubtful.

In *In re Macleay*, Law. Rep. 20 Eq. 186, there was a devise of real estate to one in fee "on the condition that he never sells it out of the family." This was held to be a good condition by Sir G. Jessel, M.R.,

it being a limited restriction on alienation. The decision was dissented from by the late Mr. Justice Pearson in *In re Rosher*, 26 Ch. D. 801, where the devise was to the testator's son in fee, with a proviso that if the son, his heirs or devisees should desire to sell the same, or any part thereof, in the lifetime of the testator's wife, she should have the option to purchase at £3000 for the whole, and at a proportionate price for any part. £3000 was much less than the value of the estate; and it was held that the proviso amounted to an absolute restraint on alienation, and was therefore void, although the restriction was limited to the life of the testator's widow.

It is clearly settled that a gift over upon an attempt to alien an absolute interest previously given is as void as a condition. This is shown by the cases of *Bradley* v. *Peixoto*, 3 Ves. 324; *Ross* v. *Ross*, 1 Jac. & W. 154; *Holmes* v. *Godson*, 8 D. M. & G. 152, in which Lord Justice Turner stated that the law is the same both as to gifts of real and personal estate; and *Shaw* v. *Ford*, 7 Ch. D. 669.

In Fearne's Contingent Remainders, 10th ed. pp. 12, 15, the difference between a conditional limitation or executory devise and a contingent remainder is discussed, the illustration given being that a limitation to the use of A. and his heirs till C. returns from Rome, and after the return of C., to the use of B. in fee, is, in a deed, a conditional limitation, in a will, an executory devise. But a limitation to the use of A. until C. returns from Rome, and after the return of C. to the use of B. in fee, is a contingent remainder to B., the whole fee not being limited to the use of A. as in the former case, but only a particular estate to endure till the return of C., which being an uncertain period such particular estate is a freehold, and consequently the limitation to B. and his heirs is a contingent remainder.

In the same work (Ibid., p. 15) it is said that limitations defeating a portion of an estate previously given "are properly termed conditional limitations, to distinguish them on the one hand from conditions, of which only the grantor or his heirs can take advantage, and on the other from remainders, in the strict and proper sense of the word as above defined: and though these conditional limitations are not valid in conveyances at common law, yet, within certain limits, they are good in wills and conveyances to uses."

In accordance with the doctrine as thus stated by Fearne there are a series of decisions, of which *Brandon* v. *Robinson*, 18 Ves. 429; *Webb* v. *Grace*, 2 Ph. 701; *Rochford* v. *Hackman*, 9 Hare, 475; and *Joel* v. *Mills*, 3 K. & J. 458, are examples, which decide that if real or personal estate be given to A. for life, with remainder to B. absolutely, with a proviso that, if A. should attempt to assign, his life estate should cease, such a proviso is read as a limitation to A. during his life or until he should attempt to assign, and upon that event, or after his death, over, and such a limitation is held to be valid.

The result is that a limitation, by way of use or in a will, to A. until he attempt to alien, and on that event to B. and his heirs, is valid, A.

taking an estate of freehold which only endures by the terms of the limitation until the attempted alienation, and B. taking a contingent remainder. But a limitation to A. "and his heirs," but if he attempt to alien, to B. in fee, is an invalid gift over. So also where the limitation is to A. "and his heirs" until he attempt to alien, and thereupon to B. and his heirs. This is as clearly a conditional limitation as the other, because a fee simple endures forever, and any attempt to cut it down must be a defeasance.

The general law is that a defeasance, either by condition or by conditional limitation or executory devise, cannot be well limited to take effect in derogation, not merely of the right of alienation, but of any of the natural incidents of the estate which it is intended to divest. Instances of this are given in *Sir Anthony Mildmay's Case*, 6 Rep. 41 a, where the law is stated thus: "If a man makes gift in tail on condition that the donee shall not commit waste, or that his wife shall not be endowed, or that the husband of a woman tenant in tail after issue shall not be tenant by the curtesy, or that tenant in tail shall not suffer a common recovery, these conditions are repugnant and against law, because by the gift in tail, he tacitly enables him to commit waste, that his wife shall be endowed, and to suffer a common recovery. And therefore it is repugnant to restrain it by condition, for that would be to give a power, and to restrain the same power in one and the same deed."

As I have shown, a conditional limitation or executory devise is subject to the same rule.

The events upon which the executory devise in this case is to take effect seem to be, (1) alienation, and (2) bankruptcy, or judgment and execution. The alienation contemplated is any alienation whatever by the devisee, not limited in any way. This is clearly invalid. With respect to the other event, bankruptcy or judgment and execution effect an involuntary alienation. Can a fee simple estate be divested by an executory devise on that event? The liability of the estate to be attached by creditors on a bankruptcy or judgment is an incident of the estate, and no attempt to deprive it of that incident by direct prohibition would be valid. If a testator, after giving an estate in fee-simple to A., were to declare that such estate should not be subject to the bankruptcy laws, that would clearly be inoperative. I apprehend that this is the test. An incident of the estate given which cannot be directly taken away or prevented by the donor cannot be taken away indirectly by a condition which would cause the estate to revert to the donor, or by a conditional limitation or executory devise which would cause it to shift to another person. This agrees with the decision of Mr. Justice Chitty in *In re Machu*, 21 Ch. D. 838. The words "conditional limitation" seem to be used in that case not in the sense in which Fearne and Butler employ them, but rather to describe an estate upon which a contingent remainder might be limited. According to the illustrations which I have given from the definition by Fearne, the

limitation in *In re Machu* would be, in a deed, a conditional limitation defeating a fee simple, and in a will an executory devise.

I am of opinion for the foregoing reasons that the executory devise in this case is invalid as repugnant.

It was attempted to distinguish one portion of it, namely, that which begins with the words "and if he shall die without leaving issue of his body him surviving," and it was argued that this gift over must be valid. But I am of opinion that this is only a portion of the limitations which are intended to take effect upon the forfeiture by alienation or bankruptcy, &c., and not otherwise.

The original devise is in trust for the plaintiff, his heirs and assigns. The intention to defeat this must be as clearly expressed as the gift, and if the last point were more doubtful than I think it is, the plaintiff ought to have the benefit of the doubt.

It is consistent with the practice of the court, as recognized in *Lady Langdale* v. *Briggs*, 8 D. M. & G. 391, that the plaintiff should have a declaration as to the nature of his interest and the validity of the gift over.

I must declare that he is entitled to an equitable estate in fee simple in the real property and to an absolute interest in the personalty given to him, and that the attempted executory gift over is void.

JACKSON *v.* ROBINS.

NEW YORK COURT OF ERRORS. 1819.

[*Reported* 16 *Johns.* 537.]

THE CHANCELLOR [KENT].[1] This is an action of ejectment brought by, or on behalf of Catharine Neilson, formerly Catharine Duer, and one of the daughters of Lord Stirling.

It appears, by the special verdict, that Lord Stirling was, on the 1st of January, 1771, seised in fee, of a tract of 3,000 acres of land in Wallkill, in the now county of Orange, and of which the premises in question are a part. That in that year, Ann Waddell recovered a judgment against him, for £7,790 of debt, and which judgment, upon the death of Ann Waddell, was revived by *scire facias*, in 1775. That Lord Stirling died in 1783; and, in 1788, the executors of Ann Waddell, undertook to revive and enforce the judgment against the representatives of Lord Stirling. A *scire facias* was, accordingly, sued out of the Supreme Court in that year, directed to the sheriff of New York, and commanding him to give notice to the heirs of Lord Stirling, and to the tenants of the lands in his bailiwick, which were bound by the judgment, to show cause, if any they had, why the debt should not be

[1] The facts are stated in the opinion of the Chancellor.

levied on those lands. To this writ of *scire facias* the sheriff returned, that he had made known to Mary Watts and Catharine Duer, who were daughters and heiresses of Lord Stirling, to appear in the Supreme Court, and show cause, if any, why the debt should not be levied on those lands. The sheriff further returned, that there were no other heirs of Lord Stirling, nor any other tenants, or any lands in his bailiwick, bound by the judgment. The heirs did not appear according to the summons, but made default, and judgment was thereupon awarded, that the executors of Waddell should have execution against those heirs of the lands which were of Lord Stirling, in 1771, and in their hands and possession. In the same year, execution issued upon the judgment so revived, to the sheriff of Ulster, commanding him to levy the debt and costs of the lands in his bailiwick, whereof Lord Stirling was seised in 1771, and in the hands and possession of those heirs. The sheriff stated, that he had seized certain lands which were of Lord Stirling, and of which he was seised in 1771, in the hands and possession of those heirs, and sold them to John Taylor. The premises in question were part of the lands so seized and sold, and John Taylor, in 1794, conveyed them to Samuel Harlow, who entered into possession, and in 1795, sold them to the father of the present defendant, who continued in possession from 1795 to 1814, when he died, and the estate descended to the defendant, as his son and heir at law.

From this state of facts, it appears that here has been an actual *bona fide* possession, under the sheriff's deed, of 25 years, and it is 31 years since Catharine Duer was personally summoned, as one of the heirs of Lord Stirling, to show cause why the judgment debt against Lord Stirling should not be levied. The defence set up against this action is twofold, and consists, 1. Of a title under the sheriff's deed: 2. Of a legal protection under the Statute of Limitations. If this defence should prove ineffectual, then the lessor of the plaintiff, Catharine Neilson, as one of the daughters and heirs of Lord Stirling, would be entitled to an undivided moiety of the premises. But she sets up a claim to the whole land, not as heir, but as devisee under her father. Lord Stirling, by his will, devised "all his real and personal estate, whatsoever, unto his wife Sarah, to hold the same to her, her executors, administrators and assigns; but in case of her death, without giving, devising, and bequeathing by will, or otherwise selling or assigning the said estate, or any part thereof, then he devised all such estate, or all such parts thereof as should so remain unsold, undevised or unbequeathed, unto his daughter Catharine Duer, to hold the same to her, her executors, administrators and assigns." The claim, however, whether as heiress, or as devisee, is still under Lord Stirling, and subject to the judgment of Ann Waddell. In whatever shape Catharine Duer, now Catharine Neilson, may put forward her claim, she still is the very person who was personally summoned in 1788, to show cause why that judgment should not be levied, and who, by her silence and default, admitted she had nothing to say.

None of the facts in the case, are the subject of dispute. The existence and validity of the judgment debt, at the time of the *scire facias*, and of the sheriff's sale, is not questioned. That the premises were owned by Lord Stirling, in 1771, and legally bound by the judgment, is not denied: that they were unoccupied in 1788, and that there was no actual tenant upon the land to summon, is granted. Neither the original judgment, nor the judgment upon the *scire facias*, nor the execution thereon, have ever been impeached, either by a writ of error, or by application to the Supreme Court, on the ground of irregularity. They all stand, to this moment, and after a lapse of upwards of thirty years, as valid proceedings, upon record. The defence, therefore, in any view of the case, is very imposing: and if, in the face of all these facts, the claim of the heir or devisee could be sustained in an action of ejectment, against the present defendant, I should apprehend that it would communicate a very injurious insecurity to title under judgment and execution.

1. The first point to be considered is, whether the defendant has not a good title under the sheriff's deed.

[This part of the opinion is omitted. The learned Chancellor was of opinion that the defendant had a good title under the sheriff's deed.]

If I am correct on this branch of the defence, it would be unnecessary to go farther. The judgment of the Supreme Court must be affirmed. But, perhaps, my opinion may not meet with the entire concurrence of the court, on this point; and as the other head of the defence arising upon the Statute of Limitations, occupied the largest and most intricate part of the argument of the counsel, I should not feel satisfied with myself, if I did not pay some attention to so learned a discussion.

If Lady Stirling took an estate in fee under the will of Lord Stirling, then at her death, Mrs. Neilson would have been entitled, as one of her heirs, to an equal undivided moiety of all her interest in the premises. But if Lady Stirling took a fee, then an adverse possession commenced when Harlow entered into possession under John Taylor, in 1794, and the Statute of Limitations began to run against her, for she was then under no disability. When the Statute once begins to run, it continues to run until the twenty years have expired, and, therefore, not only Lady Stirling, but all who claim under her by will or by inheritance, were bound in 1814, and before the commencement of this suit. The question, therefore, as to what estate Lady Stirling took under the will, becomes material *only* by its influence upon this other question of the Statute of Limitations; and it was quite entertaining to see how industriously and profoundly the counsel were obliged to labor upon the one question merely to bring it to bear upon the other.

This question is also supposed to have been decided by this court in the former cause of *Jackson* v. *Delancy*, 13 Johns. 537. But, I apprehend, that the decision of this court in that case does not rest at all upon this point, and I barely mentioned in the opinion which I then delivered,

that Lady Stirling did take a fee under Lord Stirling's will, and that the devise over to his daughter Catharine Duer was not a good limitation by way of executory devise. I relied for this upon the decision of the Supreme Court in *Jackson* v. *Bull*, 10 Johns. Rep. 19, and observed, that nothing had been urged to show why that decision was not to be regarded as correct. It is *that* decision, then, and not the one in this court, which I think governs this question. If that decision be sound, then, according to the principle of it, Lady Stirling did take an estate in fee; and, notwithstanding all that has been said or suggested to the contrary in the court below (*vide* 15 Johns. Rep. 171, 172), I am obliged still to be of the opinion, that it was a well-founded decision.

Suffer me, for one moment, to re-examine its foundations. *Redit labor actus in orbem.*

The testator, in that case, devised to his son Moses, and to his heirs and assigns forever, a lot of land, and then added, that in case his son should die without lawful issue, the property *he died possessed of*, he gave to his son Young. Moses, the son, did die in possession of the property, and without lawful issue, but he devised it by will, to his wife and others, under whom the plaintiff claimed, in opposition to the devise over to the other son.

The counsel for the plaintiff, contended, that the limitation over by way of executory devise, was void, because repugnant to the absolute power of disposal given by the will to Moses, who was thereby enabled to defeat it. The court unanimously acceded to that principle, and cited authorities in support of it, and gave judgment for the plaintiff.

The first case that the court then relied upon, was that of *The Attorney-General* v. *Hall*, Fitzg. 314, decided in 1731 by Lord Chancellor King, assisted by the Master of the Rolls and Chief Baron Reynolds. Hall, the testator, owning real and personal estate, gave it, by will, to his son, and to the heirs of his body, and if he should die, leaving no heirs, then he gave so much of the real and personal estate as his son should *be possessed of at his death*, to the Goldsmiths' Company at London, for charitable purposes. A limitation over for such a purpose had strong claims upon the protection of a court of chancery, and I hope that I may be excused for making, as a passing remark, that the will awakens interesting associations from another circumstance, which is, that Sir Isaac Newton was one of the executors. The son alienated the real estate by a common recovery, and bequeathed the personal estate by will to his wife, and died without issue. The question arose between the wife, claiming under the will, and the Goldsmiths' Company claiming by virtue of the limitation over on the event of the son dying without issue. The case was fully and ably argued, and there was no distinction made between the real and the personal estate, as to the validity of the limitation over. The court were unanimously of the opinion, that the Goldsmiths' Company had no valid claim, and that the limitation over was void, because the absolute ownership had been given to the son; for the property was given to him and the heirs of,

his body, and the company were to have no more than he should leave unspent, and, therefore, he had a power to dispose of the whole. The words that gave him an estate tail in the land, gave him the entire property in the personal estate, and nothing remained to be given over by the testator.

The point of that case then was, that where an estate is given to a man, and the heirs of his body, with a power of disposal, at his own will and pleasure, it carries with it an absolute ownership, repugnant to any limitation over, and destructive of it. The court did not make any distinction between the real and personal estate, and say, that the limitation over was good as to the one, and void as to the other. They said, *generally*, that the limitation over in the will was void, because the testator gave the son an unqualified power to spend the whole.

The other case that the court relied on in *Jackson* v. *Bull*, was *Ide* v. *Ide*, 5 Mass. Rep. 500, decided in the Supreme Court of Massachusetts, in 1805. There the testator gave by will, to his son, and to his heirs and assigns forever, certain real and personal estate, and then added, that if the son died without heirs, the estate which he *should leave* was to be equally divided between two other persons. The son did die without leaving heirs, and the question arose between those claiming the real estate under the limitation over, and those claiming it under a conveyance from the son. The opinion of the court was delivered by the late Ch. J. Parsons, whose character, as a lawyer and a judge, is held in universal reverence. He cited and relied upon the case of *The Attorney-General* v. *Hall*, and said, that "whenever it is the clear intention of the testator that the devisee should have an absolute property in the estate devised, a limitation must be void, because it is inconsistent with the absolute property supposed in the first devisee. And a right in the first devisee to dispose of the estate devised, at his pleasure, and not a mere power of specifying who may take, amounts to an unqualified gift." He then applied the rule to the case before him, and observed, that "the absolute unqualified interest in the estate devised, was given to the son, which was inconsistent with the limitation over, and, consequently, the limitation was void."

The error, in the case of *Jackson* v. *Bull*, said the learned counsel, was in applying the English case to the real estate, when it was applicable only to chattels. But the Supreme Court of Massachusetts were then in the same error, for they equally so applied it. "The limitation over," says Chief Justice Parsons, "makes no distinction between the real and personal estate, operating only on such part of either, as the first devisee should leave." In both of those cases, the devise was of real and personal estate in the same sentence, and the same limitation over was created as to each; and neither the English, nor the Massachusetts court, admitted any difference in the rule of construction, or in the operation of the power of alienation, whether applied to the limitation of the real or of the personal estate.

I do not know that either of those two last decisions have ever been questioned in any court, or by any author. They were pronounced by the highest judicial authorities; and Lord Hardwicke (1 Ves. 10) gives his sanction to the accuracy of the English case. *Beachcroft* v. *Broome* 4 Term, 441, decided in the K. B. in 1791, is in confirmation of the doctrine of the prior case. That was the case of a devise to B. and his heirs, and if he die without having settled, or otherwise disposed of the estate, or without leaving issue of his body, then the devise over. B. sold the premises in fee, and died without issue, and the question was, whether the purchaser took an estate in fee, and the K. B. held clearly that he did. The decision is entirely conformable to the doctrine in *The Attorney-General* v. *Hall*, and *Ide* v. *Ide*, and *Jackson* v. *Bull;* but a single expression of Lord Kenyon is seized upon, and great reliance was placed upon it by the counsel for the plaintiff in this cause. Lord Kenyon said (and it must have been in loose conversation on the bench), that if the case had turned on the question whether that was an estate tail in B., he should have thought it extremely clear that on failure of the first limitation, the second ought to have taken effect as an executory devise. Perhaps, the meaning of Lord Kenyon is not to be clearly understood. It was an observation not required by the decision, nor applicable to the point; but let it mean what it may, are we to permit such a loose remark to be of any weight or consideration, in opposition to the deliberate and solemn judgments of the courts? It is enough, I apprehend, merely to mention such a *dictum*, and then to pass it by in silence.

If we now apply these cases to the will of Lord Stirling, we cannot but be struck with their perfect and controlling application. He does, in the first place, devise and bequeath unto his wife *Sarah, all his real and personal estate whatsoever, to hold the same to her, her executors, administrators and assigns.* This was a gift in fee. The word estate, in a will, carries the land and all the testator's interest in it. It is *genus generalissimum*, said Lord Holt, *Countess of Bridgwater* v. *Duke of Bolton*, 1 Salk. 236, and includes all things real and personal. The words *all his estate* are, in a will, descriptive of his fee; and in a subsequent case, *Barry* v. *Edgworth*, 2 P. Wms. 523, the Master of the Rolls, referring to this opinion of Holt, said, that the law was then settled on the point, and that the word estate comprehended not only the thing, but the interest in it; and as it had been agreed and settled to convey a fee in a will, it would be dangerous to refine upon it. So again, Lord Mansfield observed, *Roe* v. *Harvey*, 5 Burr. 2638, that the word estate in a will, carried everything, unless tied down by particular expressions. And in a subsequent case, *Holdfast* v. *Marten*, 1 Term Rep. 411, Mr. J. Buller said, that the word estate was the most general word that could be used, and words of restraint must be added to make it carry less than a fee. And lastly (for I will not fatigue myself with further citations on the point), Mr. J. Patterson, of the Supreme Court of the United States, declared, 3 Cranch, 134, that the word estate was

the most general, significant, and operative word, that can be used in a will: and it comprehends both the land and the inheritance.

We may say, then, that Lord Stirling, by the first part of his will, gave an estate in fee to his wife. So he, also, repeated this gift of a fee, by the next clause in the will, when he admits expressly, that she has the power and the right *to give, devise, and bequeath, or sell or assign the estate, or any part thereof.* This power, of itself, is an attribute of ownership, and carries with it a fee. Thus, as early as 6 Eliz., Dalison's Rep. 58, it was held by the judges, that if a man devises land to his wife, to dispose of and employ it upon herself and her son, at her pleasure, she takes a fee. So again, Lord Coke says, Co. Lit. 9, 6, that if a man devises land to another, to give and to sell; this amounts to a devise in fee; for, in a will, the word heirs is not necessary to create an estate of inheritance. There are many other cases to the same effect, which I need not particularly mention (Moor. 57; 2 Atk. 102; 2 Johns. Rep. 391), and we may lay it down as an incontrovertible rule, that where an estate is given to a person generally, or indefinitely, with a power of disposition, it carries a fee; and the only exception to the rule is, where the testator gives to the first taker an estate for life *only*, by certain and express words, and annexes to it a power of disposal. In that particular and special case, the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of the reversion. This distinction is carefully marked and settled in the cases. *Tomlinson* v. *Dighton*, 1 Salk. 239; 1 P. Wms. 149, s. c.; *Crossling* v. *Crossling*, 2 Cox, 396; *Reid* v. *Shergold*, 10 Ves. 370; *Goodtitle* v. *Otway*, 2 Wils. 6.

The question then occurs, was the limitation over to Mrs. Duer valid, after the creation of such an estate in fee. The words of the will were, that "in case of the death of his wife, without giving, devising, and bequeathing by will, or otherwise selling or assigning the estate, or any part thereof, he doth give and devise all such estate as should so remain unsold, undevised, or unbequeathed to his daughter, Lady Catharine Duer," &c. This limitation over, must be either as a remainder, or as an executory devise, and it is impossible that it should be either, upon any known principles of law. No remainder can be limited after an estate in fee, and, therefore, if a devise be to A. and his heirs, and if he die without heirs, then to B., the remainder is repugnant to the estate in fee, and void. *Preston* v. *Funnell*, Willes' Rep. 164; *Pells* v. *Brown*, 2d point, Cro. Jac. 590. Nor can the limitation over operate by way of executory devise, because the power to dispose of the estate by will or deed, which Lord Stirling gave to his wife, is fatal to the existence of that species of interest. It is a clear and settled rule of law, that an executory devise cannot be prevented or defeated by any alteration of the estate out of which, or after which, it is limited, or by any mode of conveyance. It cannot be created, and it cannot live under such a power in the first taker. "These limitations," says Mr. J. Powell, *Scatterwood* v. *Edge*, 1 Salk. 229, "make estates unalien-

able, for every executory devise is a perpetuity, as far as it goes, that is to say, it is an estate unalienable, though all mankind join in the conveyance." *Vide* also, 2 Fearne, p. 51, by Powell; 2 Saund. 388, d. note. We are obliged, therefore, to have recourse to the explicit and settled doctrine, in the cases of *The Attorney General* v. *Hall*, and of *Ide* v. *Ide*, and of *Jackson* v. *Bull*, and say, that an absolute ownership or capacity to sell, in the first taker, and a vested right by way of executory devise in another, which cannot be affected by such alienation, are perfectly incompatible estates, and repugnant to each other, and the latter is to be rejected as void.

Lord Stirling clearly intended to give his wife an estate in fee. The words amount to demonstration of that intention. If she sold the land, she was not accountable for the proceeds. She could not be chargeable with waste, and she might mortgage, or encumber the land, for that is included in the right to give, and sell, and assign. And when he attempted to engraft an executory devise or limitation over, upon a fee with such an absolute power of control, he did what was incompatible with his other and principal intention, and which the courts must, of necessity, reject as repugnant and void.

There is not a case to be found, in which a valid executory devise was held to subsist under an absolute power of alienation in the first taker. I have looked at the cases so industriously collected by the plaintiff's counsel, and there are none of them that reach this point. All executory devises may be said, in some degree, to depend upon the will or discretion of the owner of the precedent estate. If a devise be to A. in fee, but if he die without issue living at his death, then over to B., it is in his volition and power (morally speaking), not to marry, or to marry, and have issue, and so avoid the devise over. So, if the limitation over be made to depend upon the contingency, that the first taker marry without the consent of B., or marry a prohibited person, he may, undoubtedly, avoid marrying without the requisite consent, or avoid marrying against the prohibition, and so defeat the limitation. But these distinctions have nothing to do with the simplicity and good sense of the general rule we are discussing. The first taker, in these special cases, has not an absolute discretion and free agency, within the meaning of the rule. The sound doctrine on the subject is, that an executory devise under the salutary checks provided for it, is a stable and unalienable interest, and the first taker has only the *use* of the land or chattel, pending the contingency mentioned in the will; and he cannot convert the property to his own use, and defeat the subsequent estate by a voluntary alienation. *This* is the rule for which we contend, and it was not so with Lady Stirling. She could give and devise, and she could sell and assign the estate when, and to whom, and for what purpose she pleased. She was a free moral agent, and an absolute and independent owner, in respect to the estate. This is what we understand by a right, incompatible with an executory devise, and this is what we are to understand by the books, when they speak of a limita-

tion over as being void, because inconsistent with such an absolute power and dominion in fee.

But it is time that this discussion should draw to a close. The result of my inquiry, is a belief that the defendant has a good title under the judgment and execution, and that if he had not, he is, nevertheless, protected by the Statute of Limitations, because Lady Stirling was seised in fee, so as to enable the Statute to run against her, when the adverse possession commenced, in 1794. Upon either ground, if correct, the judgment must be affirmed. During the examination of this subject, I have not been insensible to the weight of the inquiry, and more especially, as one of the judges of the court below seems to think the law in favor of the claim. The counsel for the plaintiff, and one of them a son of a lessor of the plaintiff, have, indeed, labored the points, in their argument annexed to the case, as well as at this bar, with a diligence and painful anxiety, and, no doubt, with a sincere conviction, that has excited my sympathy. The descendants of Lord Stirling appear to feel, that a rich inheritance has been injuriously snatched from their enjoyment, but I think it was fairly lost by the inability or neglect of their ancestor, or his representatives, to redeem the encumbrance. And if the law was with the plaintiff, would not our sympathies be as properly directed to this defendant, whose father was a *bona fide* purchaser under the execution, and cultivated the premises as his own for 20 years, and died in possession, and transmitted the fruit of his labor to his son? The truth is, that judges are bound to declare the rules of law strictly, without regard to consequences. They must follow the conclusions of the understanding, and not the dictates of the heart. If the argument on the part of the plaintiff has made a more favorable impression upon others than it has upon me, I shall be perfectly contented. I am, however, obliged to say, as the case strikes me, that the law is with the defendant, and that the judgment ought to be affirmed.

This being the unanimous opinion of the court, it was, thereupon, *ordered, adjudged* and *decreed*, that the judgment of the Supreme Court be affirmed, and that the plaintiffs in error pay to the defendant in error, fifty dollars and fifteen cents, for his costs and charges, in and about his defence in this court; and that the records be remitted, &c.

Judgment of affirmance.[1]

Bunner and *J. Duer*, for the plaintiff.

S. Jones, Jun., and *Van Buren* (Attorney-General), *contra.*

[1] Contra, *Andrews* v. *Boyc*, 12 Rich. 536 (1860).

ANDERSON *v.* CARY.

SUPREME COURT OF OHIO. 1881.

[*Reported* 36 *Ohio St.* 506.]

THIS action was commenced on December 26, 1874, by the plaintiff, in the Court of Common Pleas of Ashland County, to subject certain real estate, as the property of Thomas C. Cary, to the satisfaction of certain alleged liens, by mortgage and levy of execution, which the plaintiff claimed to have secured for certain indebtedness of said Thomas to him. The liens claimed by plaintiff are upon the undivided half of a certain tract of land devised to said Thomas and his brother, Charles L. Cary, by the eighth item of the will of their father, George W. Cary, executed in the year 1867, at which time both Thomas and Charles were minors, Charles, the younger, being about fourteen years of age.

The defendants are said Thomas and Charles, Mary Elizabeth Cary, their mother, and widow of said George W. Cary, and divers others, claiming liens on said undivided half of said lands. The principal defence, however, is made by Charles L. Cary, who claims to be the owner of the entire tract free from all encumbrances, as will hereafter appear.

The claim of the plaintiff, James Anderson, may be stated thus: On January 1, 1872, Thomas C. Cary, being then of full age, in consideration of money loaned, executed to the plaintiff his promissory note for $1,500, payable in one year, with interest at the rate of eight per cent.; and to secure the payment thereof executed (with his wife) a mortgage upon the undivided half of said tract of land, which was duly recorded in Ashland County, where said lands were situate. Afterwards, in December, 1874, the plaintiff obtained judgment on said note by confession, under a *cognovit*, against said Thomas, in the Court of Common Pleas of Richland County, and caused execution thereon to be levied on said undivided half.

Thereupon, the mortgages having been executed by said Thomas upon his interest in said lands, and other executions against him having been levied thereon, this suit was brought to marshal liens and sell the property to satisfy the same.

After the commencement of this action, and after service of summons, to wit: on March 22, 1875, by contract in writing, Thomas C. agreed to sell and convey his undivided half of said lands to Charles L., in consideration whereof Charles L. agreed to pay to Thomas the sum of $7,125, to be applied chiefly to the satisfaction of the debts of said Thomas, which he had secured by mortgage or judgment liens on said premises. In this contract, however, the lien of the plaintiff (if lien he had) was postponed to junior liens, so that the purchase-money was exhausted before the claim of plaintiff was satisfied.

By this contract of purchase Charles claims that, under the will of his father, by which alone the estate of Thomas in said lands was created, his right to the undivided half devised to Thomas is indefeasible and unencumbered by any lien or claim in favor of the plaintiff.

In the Court of Common Pleas judgment was rendered against the plaintiff, whose petition was dismissed. From this judgment the plaintiff appealed to the District Court, where the case, with an agreed and certified statement of facts, was reserved for decision in this court.

Dirlam and *Leyman*, for plaintiff.

Harrison, *Olds*, and *Marsh*, contra.

McIlvaine, J. The decision of this case depends on the construction and effect to be given to the last will and testament of George W. Cary. The question to be decided is, did the plaintiff, by his mortgage from Thomas C. Cary, or by his levy upon the same premises, acquire a lien thereon? The plaintiff claims that the interest or estate of Thomas C., devised to him in the eighth item of his father's will, as to the farm on which the testator resided, was subject to a lien under both the mortgage and execution; and that the subsequent sale of this interest or estate, by Thomas to Charles, did not displace the lien either of the mortgage or the levy. These claims of the plaintiff are contested by Charles. What, then, was the true intent of the testator? And, what, the force and effect of this devise?

The provisions of the will which at all affect the question before us are as follows:

"Item Fourth. — I give and bequeath to my beloved wife, Mary Elizabeth, the sum of six hundred dollars, to be paid out of my personal estate, one hundred dollars of the same to be paid over to her out of the first moneys collected by my executor.

"Item Fifth. — I give and bequeath to my two sons, Thomas C. Cary and Charles Lincoln Cary, the residue of moneys and the proceeds of my obligations after giving the legacies aforesaid, the same to be divided equally between them, share and share alike.

"Item Sixth. — The balance of my personal estate, consisting of personal property, farming implements, stock, cattle, sheep, and all other property, personal, except one top buggy and such surplus of grain on hand as shall not be needful for the purposes of the farm, which are to be sold by my executor, I give and bequeath to my wife aforesaid, and to my children before named for the purposes of carrying on my farm, until my oldest son, Thomas C. Cary, arrives at full age, they, the said family, to use the said property in common for the purposes of carrying on said farm and enjoying the proceeds of the same, and when my oldest son arrives at the age of majority, then I desire that my said daughter, Mary Elizabeth, shall sell her interest in the said property so held in common to my said wife and sons, before named. Then the said Mary to have for her said interest in said last named property the appraised value of such property as has been

appraised and such property as has been accumulated from said farm during said period, prior to the said majority of said Thomas, to be equally divided, and the said Mary Elizabeth to be paid such amount for her interest as shall be agreed upon between them, she to sell to them, the said sons and my said wife, her interests in said property as aforesaid.

"Item Seventh. — I give and bequeath to my said wife all my household and kitchen furniture, beds, bedding of every kind whatever, and when my said son Thomas shall have arrived at the age of majority as aforesaid, from and after that time I give and bequeath and so direct that my said wife shall have in lieu of dower one-third of the rents and profits of the farm on which I now reside in Green township aforesaid, as long as my said wife shall remain my widow, and in the event of her marriage then I order and direct that she shall forfeit her said dower as aforesaid, and in lieu thereof I direct that my two sons, Thomas and Lincoln, shall pay to her the sum of twenty-five hundred dollars, one thousand of which shall be paid within sixty days after such marriage and the balance in three equal annual payments without interest. This last item and the six-hundred-dollar item and the former provisions made in the foregoing specifications are to be in lieu of all her dower in all my real estate, including three hundred and twenty acres of land I own in the State of Iowa.

"Item Eighth. — I give and bequeath the farm on which I now live, of two hundred and eighty-five acres, to my two sons, Thomas and Lincoln, upon the following conditions: 1. I direct that they, the said sons, shall not be allowed to sell and dispose of said farm until the expiration of ten years from the time my son, Charles Lincoln, arrives at full age, except to one another, nor shall either of my said sons have authority to mortgage or encumber said farm in any manner whatsoever, except in the sale to one another as aforesaid. I also give and bequeath to my two sons aforesaid, two hundred and forty acres of land lying in the south-east corner of Fayette County, Iowa, which I received by deed from Richard Probert, and the same is now on record in said county; also eighty acres of land in Chickasaw County, Iowa, which I received by deed from A. H. Crawford."

What estate in the home farm did the testator intend, by the eighth item, to give to his sons? By section 55 of the Wills Act of 1852, in force when this will was made, it was provided, "every devise of lands, tenements and hereditaments, in any will hereafter made, shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate." The estate of the devisor in these lands was an absolute fee simple. By other provisions in this will, it is clear that the testator intended that, from the majority of Thomas, his widow, so long as she remained a widow, should have one-third of the rents and profits of said farm. Whether the right thus given to the widow was an interest in the land, or an interest in the rents and

profits as such, it is quite clear to our minds that the fee simple absolute, subject to the right of the widow, passed to the sons, as fully and amply as the testator "could lawfully devise" it. It is true, the testator coupled with the devise the words: "Upon the following conditions: I direct that they, the said sons, shall not be allowed to sell and dispose of said farm until the expiration of ten years from the time my son, Charles Lincoln, arrives at full age, except to one another, nor shall either of my said sons have authority to mortgage or encumber said farm in any manner whatsoever, except in the sale to one another as aforesaid." But by these conditions (so nominated) we do not understand that the testator intended a forfeiture upon breach: there is no limitation over in favor of any one; and if a forfeiture for the benefit of his heirs was intended, the devisees, being two of his three heirs, would each have inherited a third part; so that, as heir of the testator, Thomas C. had full power to charge one-third of the land by mortgage to the plaintiff. But there is no indication in the will, or in the circumstances of the testator, that he intended, in any event, to die intestate as to this property; while, on the other hand, it seems clear to us that the testator intended, in all events, that his sons should take this farm, subject to the rights given to their mother, to have and to hold the same to them and their heirs forever. Instead of giving to his sons an estate in the land less than a fee simple, his intent and purpose was to give them the fee simple, but to eliminate therefrom its inherent element of alienability, for a limited period, or to incapacitate his devisees, although *sui juris*, from disposing of their property for the same limited period, to wit: until the younger should arrive at thirty-one years of age — each and both of which purposes are repugnant to the nature of the estate devised.

By the policy of our laws, it is of the very essence of an estate in fee simple absolute, that the owner, who is not under any personal disability imposed by law, may alien it or subject it to the payment of his debts at any and all times; and any attempt to evade or eliminate this element from a fee simple estate, either by deed or by will, must be declared void and of no force. *Hobbs* v. *Smith*, 15 Ohio St. 419.

Of course, we do not deny that the owner of an absolute estate in fee simple may by deed or by will transfer an estate therein less than the whole, or may transfer the whole upon conditions, the breach of which will terminate the estate granted, or that he may create a trust whereby the beneficiary may not control the corpus of the trust, or even anticipate its profits. But as we construe this will, nothing of the kind has been here attempted. The attempt here was to fasten upon the estate devised a limitation repugnant to the estate, which limitation, and not the devise, must be for that reason declared void.

It is contended on behalf of defendant, Charles L. Cary, that by this devise an estate in trust, until the younger son should arrive at the age of thirty-one, was created for the benefit of the widow and children of the testator. That such was the effect of the so-called "conditions,"

when construed in connection with other clauses of the will. We do not so understand the will.

When the elder son, Thomas, arrived at age, the daughter ceased to have any right whatever in the devised premises.

The right of the widow to one-third the rents and profits of the farm was not affected by the arrival of Charles at thirty-one years of age, and did not affect the absolute character of the devise to the sons. If she took during widowhood one-third of the lands, the sons took a vested remainder in that portion, and a present vested estate in the other two-thirds. If her right was to rents and profits as such, and the same was made a charge upon the lands, the estate of the sons nevertheless vested in them and for their own benefit, subject to the encumbrance. The relation of trustee and *cestui que trust* existed between them in no proper sense. The grantees of the sons would have stood in the same relation to the widow. No relation of personal confidence or trust was created, but one growing out of property rights alone — strictly legal rights. Whatever may have been the desire of the testator as to his widow remaining on this farm after the majority of the elder son, it is quite clear that the rights of the devisees were not made to depend on that event. The personal relations of the members of his family were not provided for after the arrival of Thomas at age, but their property rights, respectively, were defined; and the rights of neither were subjected to the control or supervision of the other. There was no trust created.

If we could find in this devise a trust in favor of the widow, until Charles should arrive at thirty-one years of age (and certainly there was none before, if not after), so that no absolute estate vested in the sons previous to the termination of such trust estate, or if we could find a condition which prevented the vesting of the fee for such limited period, or a condition subsequent upon the happening of which the estate devised could be defeated, a different conclusion, no doubt, would be reached.

But the case before us, is the devise of an absolute fee, with a clause restraining the alienation and encumbering of the estate for a limited period, intended, no doubt, for the protection of the devisees, who alone are interested in the estate devised. In holding that such restraint is repugnant to the nature of the estate devised, and is void as against public policy, which in this State, in the interest of trade and commerce, gives to every absolute owner of property, who is *sui juris*, the power to control and dispose of such property, and subjects the same to the payment of his debts, we are fully aware of the fact that many authorities may and have been cited to the contrary. Others, however, support the view we have taken, but I shall not attempt either to review or reconcile the cases, being content to rest the decision upon what we conceive to be sound principle and sound policy. The owner of property cannot transfer it absolutely to another, and at the same time keep it himself. We fully admit that he may restrain or limit its

enjoyment by trusts, conditions or covenants, but we deny that he can take from a fee simple estate its inherent alienable quality, and still transfer it as a fee simple.

Decree for plaintiff.

B. *Estates for Life and for Years.*

LOCKYER *v.* SAVAGE.

EXCHEQUER IN EQUITY. 1733.

[*Reported* 2 *Stra.* 947.]

THE plaintiffs brought a bill as assignees of a commission of bankruptcy against Norris, to have an account of the personal estate which the bankrupt's wife's father died possessed of, he being a freeman of London.

The defendants insisted, that by articles between the bankrupt and Freeman and his daughter, previous to the marriage, she had in consideration of £4000 advanced by the father in his lifetime, released her right to any further demand out of the personal estate; and that the £4000 was settled to the use of the bankrupt for life, but if he failed in the world, the trustees were not to pay the produce to him, but apply it to the separate maintenance of the wife and children.

Upon the hearing two points were ruled: 1. That a child of full age might, for the consideration of a present advancement, bar herself of the customary share. And that it was stronger in the case of a child who had a right, than in the case of an intended wife, which had been allowed. 2 Vern. 665. 2. That the provision for her maintenance in case the husband failed, was good against creditors; it not being a provision out of the bankrupt's estate, but the settlement of her own fortune. Abr. Equ. Cas. 53, 54. And though it was objected, that the profits were forfeited by the act which was to vest the separate right in the wife, viz., bankruptcy; and when two rights concur, *fortior est dispositio legis quam hominis:* yet the court compared it to the case of a lease, where the lessee is restrained from assigning without consent of the lessor, and the assignment has always been held to be void. The bill was dismissed with costs. *Strange* pro defendente.

ROE d. HUNTER *v.* GALLIERS.

KING'S BENCH. 1787.

[*Reported* 2 *T. R.* 133.]

IN this ejectment a special verdict was found before *Gould*, J., at the last assizes at Hertford, which stated that John Hunter being seised in fee of the premises in question, demised the same by two several leases dated 24th December, 1778, to Green, who for some time before had been and afterwards continued to be a dealer in horses, for twenty-one years from Michaelmas, 1778, at rack rents for both farms of £150 a year, without any fine or other consideration than the yearly rents; in each of which leases is contained the following proviso: "that if the said yearly rents thereby reserved, or either of them, or any part thereof, shall be behind or unpaid for twenty days next after the respective days of payment, being lawfully demanded; or if the said J. Green, his executors, or administrators, shall assign over the indenture of lease, or assign or let the premises thereby demised, or any part thereof, to any person whatsoever for any time or times whatsoever, without the license or consent of the said J. Hunter, his heirs, and assigns, first had or obtained in writing under his or their hands for that purpose; *or if the said J. Green, his executors, or administrators, shall commit any act of bankruptcy within the intent and meaning of any Statutes made or to be made in relation to bankrupts, whereon a commission shall issue, and he or they shall be found or declared to be a bankrupt or bankrupts;* or if he or they shall make any composition with his or their creditors for the payment of his or their debts, though a commission of bankrupt doth not issue, or if he or they shall make any assignment of his or their effects in trust for the benefit of his or their creditors; *that then and from thenceforth in any of these cases it shall and may be lawful to and for the said J. Hunter, his heirs, and assigns, into the said demised premises to re-enter*, and the same again to have, re-possess, and enjoy, as in his or their former estate, anything therein contained to the contrary notwithstanding." It is then found that counterparts of the said leases were executed. That the two farms after such demise and before the bankruptcy of Green were improved by the bankrupt £30 per annum. It then stated the act of bankruptcy; that a commission issued thereon on 3d February, 1787; that Green was duly found and declared a bankrupt; and that the defendants afterwards entered into the premises, and were possessed as assignees under the commission and the usual assignment; upon whom the said John Hunter afterwards entered. But whether, &c.

Rous, for the plaintiff.

Morgan, for the defendant.

ASHHURST, J. The only question is, whether a proviso in a lease, that if the lessee commit an act of bankruptcy, or, in other words, do any of those acts upon which a commission of bankrupt may be sued out, the landlord shall have a right to re-enter, be legal or not? The general principle is clear, that the landlord, having the *jus disponendi*, may annex whatever conditions he pleases to his grant, provided they be not illegal or unreasonable. Then is this proviso contrary to any express law; or so unreasonable as that the law will pronounce it to be void? That it is not against any positive law is admitted; and no case has decided it to be illegal. In the case of *Lord Stanhope* against *Skeggs*, the court were divided in opinion upon the question which arose there; therefore that is no authority either way: but considering what the ground of that difference was, it is some authority in support of this proviso; for the doubt arose upon considering whether a clause of restraint could operate upon executors to prevent them from assigning land which was expressly leased to the original tenant and *his executors, eo nomine*, when that was the only means by which they could exercise their trust. Now that doubt does not occur in this case, this question turning on a different point. This proviso then not being against any express authority of law, it remains to be considered whether it be void or unlawful as against reason or public policy; now it does not appear to me to be against either. First, it is reasonable that a landlord should exercise his judgment with respect to the person to whom he trusts the management of his estate; a covenant therefore not to assign is legal; covenants to that effect are frequently inserted in leases; ejectments are every day brought on a breach of such covenants. The landlord may very well provide that the tenant shall not make him liable to any risk by a voluntary assignment, or by any act which obliges him to relinquish the possession. If it be reasonable for him to restrain the tenant from assigning, it is equally reasonable for him to guard against such an event as the present, because the consequence of the bankruptcy is an assignment of the property into other hands. Perhaps it may be more necessary for the landlord to guard against this latter event, as there is greater danger to be apprehended by him in this than in the former case. Persons who are put into possession under a commission are still less likely to take proper care of the land than a private assignee of the first tenant. Neither is there any reason of public policy to be urged against allowing such a proviso. It conduces to the security of landlords, which can never be urged as a ground of objection on that head. On the whole therefore I am of opinion that this is a valid proviso; and, the lease having been forfeited by the tenant's becoming a bankrupt, the lessor of the plaintiff is entitled to recover.

BULLER, J., after commending the conciseness of the special verdict, and recommending it as an example in future, said, the question lies in a very narrow compass; whether a proviso in a lease for twenty-one years, that it shall be void if the lessee become a bankrupt, be good in

law? The defendant's counsel has commented much upon the different parts of this proviso. I cannot say whether any part of it may or may not be objectionable with reference to the Statutes concerning bankrupts; we are now to decide upon the construction of a proviso at common law, and not on any Statute. There is a great difference between them: Lord Chief Justice Wilmot took the distinction in a case before him in the Common Pleas, in which his Lordship said, where the question depends on a Statute, that mows down all before it, and it acts like a powerful tyrant that knows no bounds: but the common law operates with a more lenient hand; it roots out that which is bad, and leaves that which is good. The question here is, whether this proviso be good according to the principles of the common law as to that part of it on which this question arises, namely, the act of bankruptcy, which is the only point necessary to be considered. The cases cited by the defendant's counsel have not the least analogy to the present question. That which was cited from Equity Cases Abridged proves nothing to this purpose. It was there taken for granted that a clause to prevent alienation by the tenant was good; but the court considered that the particular alienation in question was not within the terms of the covenant, because the covenant only extended to the act of the party, and that was an alienation in law, for the assignment was by virtue of a Statute. This case has also been argued on general principles of inconvenience, because the possession of an estate on such terms enables tenants to hold out false colors to the world. But that sort of observation does not apply to the case of land; for a creditor would not rely on the bare possession of the land by the occupier, unless he knew what interest he had in it. If he were desirous of knowing that, he must look into the lease itself; and there he would find the proviso that the tenant's interest would be forfeited in case of his bankruptcy. The stock upon a farm may indeed induce a credit; but that will not govern the present case. It is next urged that this is equivalent to a proviso that the lease shall not be seized under a commission of bankrupt; the defendant's counsel having first supposed the lease to be granted absolutely for a certain term, and then that a subsequent proviso is added to that effect. Such a proviso as that indeed would be bad, because it would be repugnant to the grant itself: but here there is an express limitation that the lease shall be void upon the fact of the lessee's becoming a bankrupt. It is clear that the landlord in this case parted with the term on account of his personal confidence in his tenant; that is manifestly the case in all leases where clauses against alienation are inserted. The landlord perhaps relies on the tenant's honesty; or he approves of his skill in farming, and thinks he will take more care of the farm than another; and therefore he has a right to guard against the event of the estate's falling into the hands of any other person, who may not manage it so well as the original tenant. Suppose a lease were made for twenty-one years, on condition that the tenant shall so long continue to occupy the land personally; there could

be no objection made to such a condition, for the personal confidence is the very motive of granting the lease; and that is like the present case. *Lord Stanhope's Case* does not apply at all to this. In the first place, the court were equally divided, and therefore the case is of no authority. In mentioning this, I do not mean to say, or even to insinuate, that the opinion which I then held was right. But there is a great difference between the two cases: for there the lease was granted to the tenant, *his executors*, and administrators: they were to take as such, which gave rise to the doubt in that case; and Lord Mansfield there said, the difficulty is, that, as by the terms of the lease the executors were to take, the subsequent proviso that they should not assign seems to be repugnant to the grant itself. Again, that was not a husbandry lease for twenty-one years, like the present, but for forty-one years; and there may be great reason for a distinction between the two terms; for if such a proviso as this were inserted in very long leases, it would be tying up property for a considerable length of time, and would be open to the objection of creating a perpetuity. But the principal ground is, that this is a stipulation not against law, not repugnant to anything stated in the former part of the lease, but merely a stipulation against the act of the lessee himself, which I think it was competent for the lessor to make.

Grose, J. The question is, whether the landlord may not stipulate that he will let his land only to the tenant, or to such assignee of the tenant as the landlord shall approve of. I know of no Statute or case which says that such a stipulation is bad. The defendant's counsel has called to his assistance the 21 St. Jac. 1, but that has never been construed to extend to lands, it only relates to goods and chattels. The argument of the tenant's obtaining credit by holding out false colors, does not apply to the case of land, but merely to goods; for a man does not get credit merely from the *occupation of land*, but from the *interest* which he has in it; in order to know which it is necessary that the creditor should see the lease, which, when produced, would show that the estate would be defeated upon the tenant's becoming a bankrupt. Therefore the argument derived from the credit which the tenant is likely to get by being in possession of the land, can have no weight in this case. As to the inconvenience which it has been contended will arise from establishing the validity of this proviso, it rather bears the other way; for this cannot be determined to be illegal on any principle which would not equally extend to leases which are every day granted in large towns, restraining the assignment of houses to persons exercising obnoxious trades; that not only diminishes the value of the particular house so assigned, but also the adjoining houses, belonging probably to the same landlord.

Judgment for the plaintiff.

DOMMETT *v.* BEDFORD.

KING'S BENCH. 1796.

[*Reported* 6 *T. R.* 684.]

T. BEDFORD clerk deceased, being seised of several freehold estates, duly made and published his last will dated in July 1782, and properly executed and attested, &c., and gave "to his niece A. Ireland one annuity of £30 to be paid her by two equal half-yearly payments, during her natural life, the first payment to be made in six months after his decease," "under this strict direction that this annuity shall not be subject to the debts or control of her present or any future husband, and that the same from time to time shall be paid to herself only, and that a receipt under her own hand, and no other, shall be a sufficient discharge for the payment thereof; his intent being that the said annuity or any part thereof shall not on any account be alienated for the whole term of her life or for any part of the said term; and if the same shall be so alienated, the said annuity shall immediately thereupon cease and determine." He then gave to his nephew R. Tubb one annuity of £30 during his natural life, payable in like manner as the former annuity, and with the same direction of being paid to himself only, and on his own receipt, and under the same restriction against alienating the same or any part thereof. And he then gave to his nephew Bedford Woodham one annuity of £30 during his life, payable in the like manner as the above annuities, with the same direction of being paid into his own hands only, and on his own receipt, and under the same restriction against alienating the same or any part thereof. The devisor charged his real and freehold estates with the payment of those three annuities; and then devised his said estates to his nephew, the defendant, John Bedford and his heirs, subject to the annuities which were thereby and by his late brother John Bedford charged upon them. The devisor died in 1789, leaving the said John Bedford his heir at law. On the 16th of November, 1790, a joint commission of bankrupt issued against the said Bedford Woodham together with A. Davidson his then co-partner in trade; and they were duly found and declared bankrupts. The plaintiffs were chosen assignees of their estate and effects; and by indenture of bargain and sale dated the 30th of June, 1791, and which was duly enrolled, &c. made between the major part of the commissioners of the one part, and the plaintiffs of the other part, the commissioners bargained sold and assigned to the plaintiffs and their heirs and assigns (amongst other things) the said annuity of £30 so given by the will of J. Bedford to Bedford Woodham for and during the term of the life of Bedford Woodham, in trust nevertheless and to and for the several uses of the plaintiffs and all the other creditors of Davidson and Bedford Woodham, who should come in under the commission. The plain-

tiffs exhibited their bill of complaint in the High Court of Chancery against John Bedford and Bedford Woodham, thereby praying (amongst other things) that they might be declared entitled to the said annuity or rent-charge of £30 during the life of Bedford Woodham. John Bedford by his answer submitted to the judgment of the court whether the annuity was or not according to the conditions and restrictions mentioned in the will determined by the bankruptcy of Bedford Woodham and the execution of the assignment of his effects. And Bedford Woodham by his answer submitted that as he had not voluntarily alienated the said annuity he was still entitled to receive the same from John Bedford.

On the 10th of December, 1795, the cause was heard, when it was ordered that a case should be made for the opinion of the judges of this court, and that the question be whether "by such bankruptcy and bargain and sale the annuity of £30 a year in question in this case ceased and determined?"

Gally, for the plaintiffs.

Bedford, for the heir at law.

Humphreys, for the bankrupt.

The following certificate was this day sent to the Lord Chancellor.

"This case has been argued before us by counsel; and we have considered it, and are of opinion that by the bankruptcy of Bedford Woodham and the indenture of bargain and sale of the 30th June, 1791, the annuity of £30 a year in question in this cause ceased and determined.

KENYON. N. GROSE.
W. H. ASHHURST. S. LAWRENCE."

SHEE *v.* HALE.

CHANCERY. 1807.

[*Reported* 13 *Ves.* 404.]

JOHN MOOTHAM by his will, dated in March 1803, gave and bequeathed all the residue of his real and personal estate to trustees, upon trust, to pay to his son John Mootham the yearly sum of £200, clear of all deductions, during the term of his natural life, or until such time as his said son should actually sign any instrument, whereby or in which he should contract or agree to sell, assign, or otherwise part with, the same or any part thereof, or any way charge the same, or any part thereof, as a security for any sum or sums of money, to be advanced or lent to him by any person or persons whomsoever, or in any other manner whatever charge or dispose of such annuity, or any part thereof, by anticipation; or whereby or in which he should authorize or em-

power, or intend to authorize or empower any person or persons whomsoever to receive such annuity, or any part thereof, except only as to the then next quarterly payment, after such authority or power should be given: such annuity or annual sum to be paid to his said son John Mootham by four equal quarterly payments; and he declared his will to be, that in case his said son should at any time sign or execute any such instrument or writing for the purposes or any of the purposes aforesaid, (except as aforesaid,) then and from thenceforth the same, and every part thereof, should cease to be paid or payable to him; and should sink into the general residue of his personal estate.

By a codicil, dated the 27th of December, 1803, the testator bequeathed the residue of his estate and effects to the same trustees, upon trust to pay the interest and produce thereof unto his wife Elizabeth, during her life; and after her decease directed them to transfer such residuary personal estate to other persons.

The testator died on the 6th of July, 1804. John Mootham, the son, being in confinement for debt, took the benefit of an Insolvent Act, passed on the 30th of July, 1804; and the annuity of £200 under the will of his father was inserted in the schedule of his property delivered in, and signed by him.

The bill was filed by the assignees under the Insolvent Act, claiming the annuity. The answers raised the question, whether the annuity was forfeited and sunk into the residue.

Mr. Richards and *Mr. Roupell*, for the plaintiffs, and *Mr. Fonblanque* and *Mr. W. Agar*, for the defendant Mootham.

Mr. Thomson and *Mr. Benyon*, for the residuary legatees.

The Master of the Rolls. [Sir William Grant.] The intention of the testator, to make this annuity personal to his son, cannot be doubted. The question is, whether that intention is sufficiently expressed. He has gone awkwardly about it, by expressing particular acts. His son was not to have this as a fund of credit. The testator supposed he had sufficiently guarded against that. It appears to me, that the son has done an act within this will, to authorize or empower others to receive this annuity. This differs from the case of the bankrupt. The bankrupt had not done anything. The insolvent debtor was not in a situation to be compelled to part with this annuity. He might have enjoyed it for his life. The signing of the petition and schedule appear to me to be clear acts. As to the intention there can be no doubt.

HIGINBOTHAM *v.* HOLME.

CHANCERY. 1812.

[*Reported* 19 *Ves.* 88.]

By indentures of settlement, previous to the marriage of the plaintiffs, the plaintiff William Mosley Higinbotham conveyed to trustees freehold estates of inheritance and leasehold estates for lives and years, to hold to them, their heirs, executors, &c. after the marriage to the use of the plaintiff, the husband, for life, unless he shall hereafter embark in any trade or business and in the lifetime of his said intended wife shall become bankrupt, and from and after his decease or his being declared a bankrupt, which shall first happen, to the use, that the plaintiff Sarah Higinbotham, in case she should survive her husband, and Hannah Higinbotham should be then living, should receive an annuity of £150 during the several lives of Sarah and Hannah Higinbotham; but in case Hannah should be dead at the decease or bankruptcy of the plaintiff, or should afterwards die in the lifetime of Sarah, then from and after such death or bankruptcy of the plaintiff and Hannah Higinbotham, that the plaintiff Sarah should receive an annuity of £200 for her life, payable quarterly: the first payment to be made on the first quarter day next after the death or bankruptcy of William Mosley Higinbotham: the respective and successive annuities to be in bar and satisfaction of dower, and other share and claim, which the plaintiff Sarah Higinbotham would or might have had out of the real and personal estate of her intended husband; and in case the said annuities or either of them should become payable during the life of the plaintiff Sarah, the same to be paid into her proper hands, to and for her own separate use and benefit, free from the debts, control, or intermeddling, of her said husband; and subject to the said annuities, from and after his decease or bankruptcy to the use of trustees for five hundred years as to the freehold estates of inheritance, and ninety-nine years as to the leasehold estates, upon trust to pay the arrears of the annuities; and subject thereto, to the use of the plaintiff, William Mosley Higinbotham, his heirs, executors, &c.

The plaintiff, the husband, was not at the time of his marriage indebted, or engaged in trade; nor had he at that time any intention of that sort; having been educated for orders: but in 1802 he entered into trade as a cotton manufacturer; and on the 28th of January last a commission of bankruptcy issued against him; Hannah Higinbotham being still living.

The bill, praying a declaration, that the plaintiff Sarah is entitled to the annuity of £150, was dismissed at the Rolls; from which decree she appealed.

Sir Samuel Romilly and *Mr. Bell*, for the appellant.

Mr. Wyatt, for the defendants.

The Lord Chancellor. [Lord Eldon.] The facts upon which this decree has been pronounced at the Rolls, are, that the husband of the petitioner at the time of their marriage was not indebted; and had no formed purpose of entering into trade; but, having been intended for the Church, he changed his purpose; entered into trade; and became a bankrupt; and the question is, whether a provision of this sort can be sustained against creditors by charging his estate, as against their right under the commission, with this annuity, to which she will upon his death have an undoubted title.

With a strong wish to relieve the petitioner from the effect of this decree, I have endeavored in vain to apply the principle of those cases, which have turned upon the fact, that a man, not indebted, or a trader, at the time, made a settlement, without reference to debts to be contracted in future, and to the future event of bankruptcy. This case has no resemblance to those. This settlement looks forward to a change of intention, to the purpose of becoming a trader; and looks forward expressly to the possible consequences of that purpose; and so looking forward to such a change of purpose, and to such consequences, it is a limitation, by the effect of which the estate would go to the creditors; that change being adopted with the express object of taking the case out of reach of the bankrupt laws; and as to the consideration from the covenant of the father, which, though it may perhaps prove worth little or nothing, is to be regarded as a consideration with reference to all the provisions of the settlement, though undoubtedly an annuity might have been provided by the settlement for the wife in all events, yet it is not competent to a party, giving a consideration for a contract, that is a direct fraud upon the bankrupt laws, to have the benefit of it. I cannot assimilate this to the case of the wife's property limited until the bankruptcy of her husband; that is, where she reserves a power over her own property; or to the case of a lease made determinable by the bankruptcy of the lessee: that is a reservation by the owner of the property of a power over it; or to the case *Ex parte Winchester*, 1 Atk. 116, and others, where, as the contingency happened previous to the bankruptcy, the debt was provable; or to the case put by Lord Kenyon, and observed upon by Lord Redesdale, of a bond, payable immediately, given by a trader on his marriage to trustees to secure a provision for his wife and children. Therefore, having struggled much to sustain this provision, I must declare my opinion, that the decision of the Master of the Rolls is right: but this has been so reasonably made the subject of an appeal, that they may take the deposit back.

PHIPPS *v.* ENNISMORE.

CHANCERY. 1829.

[*Reported* 4 *Russ.* 131.]

JOHN BALDERS by his last will devised his manors, lands, and tenements in certain parishes in the county of Norfolk, subject to a term of 500 years, and the payment of certain annuities, to his son Charles Morley Balders and his assigns during his life, with power to limit or appoint them, or any part of them, for a jointure to a wife. The trusts of the term were to pay £100 a year to Charles Morley Balders, till he attained the age of twenty-one, and then £200 a year, till he attained the age of thirty; and to raise a sum of £3000 and another sum of £2000 for the testator's daughter. Charles Morley Balders completed his thirtieth year on the 16th of April, 1801.

In 1803, previous to and in consideration of a marriage then intended between Charles Morley Balders and Mary Hare, a daughter of Lord Ennismore, an indenture, bearing date the 15th of January, was executed by Charles Morley Balders of the first part, Lord Ennismore and his daughter of the second part, and trustees of the third part, by which, after reciting that Lord Ennismore had paid £9200 to the trustees, it was declared that £6200, part of that sum, was to be paid to Balders for his own use, and the remaining £3000 was to be invested in the public stocks, or on the security of the term of 500 years, upon certain trusts for the husband and wife, and the issue of the marriage. By the same deed Charles Morley Balders demised the premises, of which he was tenant for life, to the trustees for a term of ninety-nine years, in order to secure the payment of £300 a year as pin-money to Mary Hare, to her separate use during the joint lives of himself and her; and he limited a jointure to her in the event of her surviving him.

The same parties, on the same day, executed another indenture, by which (after reciting, that, inasmuch as doubts might be entertained with respect to the sufficiency of the term of 500 years as a security for the £3000, provision should be made, out of the surplus rents and profits of the premises, after payment of the £300 a year to Mary Hare, for the eventual deficiency of that security by an extension of the trusts of the term of ninety-nine years, and that it was agreed that Charles Morley Balders should enter into engagements restraining himself from alienating, charging, or encumbering his life estate or interest in the premises), he, Charles Morley Balders, for himself, his heirs, &c., did covenant with Richard Viscount Bantry, Richard Hare, William Henry Hare, and John Jones (the trustees), their executors, administrators, and assigns, "that, in case the marriage should take effect, he should not nor would at any time during his life sell, mortgage, charge, or in any manner encumber the manor and premises in the indenture of even

date therewith granted and demised, with any sum or sums of money, either annual or in gross, or in any other manner whatsoever; and it was thereby agreed and declared between the parties, that, if he, Charles Morley Balders, should at any time sell, mortgage, charge, or in anywise encumber the said manors and premises, or any of them, or attempt so to do, or execute, or attempt to do or execute any act, whereby the same should be vested in any other person, then and in such case the trustees for the time being of the term of ninety-nine years should receive the rents, issues, and profits of the hereditaments and premises comprised in the term of ninety-nine years, and after satisfying the annual sum of £300, being the pin-money of Mary Hare, should pay and apply the same rents, issues, and profits in such manner as they should think proper for the maintenance and support of Charles Morley Balders, or his wife, or children, or issue; and further, that, in case the security intended to be made of the residue of the term of 500 years should, in the opinion of the trustees or trustee for the time being, prove defective and inadequate for all or any part of such portion of the sum of £3000, if any, as should be lent thereon, whereby the loss of any part thereof should be sustained, or should be apprehended by the trustees or trustee, then that the trustees, or the survivor of them, &c., might receive all the rents, issues, and profits of the said premises, over and above the £300 a year directed to be paid to Mary Hare, and should pay and apply such yearly sum as to them the trustees should seem proper, not exceeding in the whole one third part of such surplus of the clear yearly rents, issues, and profits of the said premises, unto and for the personal maintenance and support of C. M. Balders, and his wife and family, as the trustees should in their or his discretion think proper; and upon further trust from time to time to lay out and invest the ultimate residue or surplus of such yearly rents, issues, and profits of the premises, other than such parts thereof as should be necessary for effecting and keeping on foot a certain insurance on the life of Charles Morley Balders, in the public stocks or funds, or on real or government securities, at interest in the names of the trustees; and, in like manner, from time to time to lay out and invest the dividends, interest, and annual produce of such money, stocks, funds, and securities in their names, in order to accumulate in the nature of compound interest, until the moneys, so to be from time to time invested, should amount to a sum equal to that which should have been originally advanced upon the security of the term of 500 years, or so much thereof as should not be actually received by virtue of that security." The indenture contained also a declaration, that the trustees, and the survivor of them, his executors and administrators, should stand possessed of and interested in such accumulated fund, and the dividends, interest, and annual produce thereof, from the time such accumulations should cease, as a security for the sum of £3000 and the interest thereof, and subject thereto, in trust for Charles Morley Balders, his executors, administrators, and assigns.

The marriage was solemnized; and several children were the fruit of it.

In February and June, 1810, Charles Morley Balders granted, for valuable consideration, to the Albion Insurance Company, two redeemable annuities — the one, of £485, — the other, of £258, — charged on the lands of which he was tenant for life under his father's will; and, to secure the payment of the annuities, he demised the lands to a trustee for ninety-nine years.

The annuities having fallen into arrear to the amount of more than £2000, the Albion Insurance Company, by their secretary and trustees, filed, in 1814, a bill, praying that the indenture of settlement and the deed of covenant, dated respectively the 15th of January, 1803, might, so far as respected the interest reserved to Balders, be declared fraudulent and void.

Pending the suit, Balders died.

By the decree, made at the original hearing, the Vice-Chancellor directed the master to inquire what sums of money the trustees of Mr. Balders's settlement had received since the filing of the bill, in respect of rents and profits of the premises accrued due before that gentleman's death, and how those sums of money had been applied.

By the master's report it appeared, that considerable sums, out of the rents and profits of the premises, had been applied by the trustees to the education and maintenance of the children of Charles Morley Balders, and in making payments for his personal benefit.

By the decree made by the Vice-Chancellor on further directions, it was declared, "that the trustees were not entitled to be allowed, out of the moneys received by them, any sums of money paid or allowed by them, which were for the personal benefit of Charles Morley Balders, or for the maintenance and education of his children." And it was ordered, "that the master should ascertain, whether any, and which of the sums mentioned in the schedules to his report as paid or allowed by the trustees, were to be considered as paid or allowed for the personal benefit of Charles Morley Balders, and that the master should disallow the same, and also the sums alleged to have been paid for the maintenance and education of the children."

The trustees and the children appealed against so much of the decree as contained this declaration, and the directions founded upon it.

The question was, Whether the second deed of the 15th of January, 1803, was valid as against an encumbrancer, so far as it provided that, if Balders sold or encumbered his life interest, it should be lawful for the trustees of the term, created by the first deed of the same date, to apply the rents and profits, after paying Mrs. Balders's pin-money, to the maintenance and support of Mr. Balders, or his wife or children, in such manner as they should think proper.

Mr. Sugden and *Mr. Wilbraham*, for the appellants.

Mr. Heald, *Mr. Bickersteth*, and *Mr. Daniel*, contra.

The Lord Chancellor. [Lord Lyndhurst.] The question in this cause is, Whether, in a transaction of such a kind as appears in these pleadings, Balders could charge this property with the payment of the annuities granted to the Albion Insurance Company; or, is the provision in the second deed to have effect, so as to defeat the securities given for the payment of the annuities.

The case was argued as to two points. It was said, first, that the provision, enabling the trustees to apply the rents and profits to the maintenance of Balders himself, was sustainable; and, secondly, that, assuming that the provision, enabling the trustees to apply the rents and profits for the maintenance of Balders himself, could not be sustained as against the encumbrancer, yet the court would sustain it so far as regards the application of those rents and profits to the maintenance of the wife and children of Mr. Balders. The first point was not much pressed, and seems to me free from all reasonable doubt. The transaction, in that respect, cannot be sustained. Balders has a life-interest in certain property; having that life-interest, can it be contended, that he can enter into a covenant — a private deed — with his own trustees, that he shall not encumber his interest in the property, and that, if he does encumber it — if, for instance, he sells it for valuable consideration, — the effect is to be, that the purchaser shall not be entitled to possess what he has bought, but that Balders himself, subject to the discretion of his trustees, and under their direction, shall continue to enjoy the rents and profits, as if the alienation had not taken place? In point of law, such a transaction cannot be sustained.

The only question, which admits of doubt, is, Whether the provision can be sustained against the encumbrancer, so far as regards the application of the rents and profits to the maintenance of the wife and children? It was admitted on all hands, that the parties to the deed did not contemplate a fraud; but the transaction is, in its very nature, fraudulent. Though the parties had no fraud in view, the deeds themselves are fraudulent. If the tenant for life procured any person to advance money to him on the security of the property, in that event, and in that event only, was the instrument in question to have operation. In point of law, the deed cannot be sustained. I concur, therefore, with the judgment of the Vice-Chancellor.

The question was before Lord Eldon on a motion; and, though he did not express a decisive opinion, I collect, that he concurred in the view which I have taken of the case.

Appeal dismissed.

LESTER *v.* GARLAND.

CHANCERY. 1832.

[*Reported* 5 *Sim.* 205.]

THE VICE-CHANCELLOR.[1] [SIR LANCELOT SHADWELL.] By the settlement made on the marriage of Miss Garland with Mr. Spurrier, it was recited that Mr. Spurrier, in case the marriage should take effect, would, in right of his intended wife, become entitled to a sum of £1,000 when she should attain the age of 21 years; and that her father had agreed to pay down £4,000 to the husband, who, in consideration of the intended marriage, and in order to make a provision for his intended wife and the issue of the marriage, had agreed on his part, to advance a sum of £33,333 6*s.* 8*d.* Three per Cent. Reduced Bank Annuities, to be settled upon the trusts thereinafter mentioned. And then it recites that the £4,000 had been paid, by the father of the lady, to Mr. Spurrier, and that he had transferred the stock to the trustees. The settlement then declares that the trustees are to stand possessed of the sum of £33,333 6*s.* 8*d.* Reduced Annuities upon trust, after the marriage, to pay the dividends to Mr. Spurrier for his life, or until, by, or in consequence of any unforeseen misfortunes in trade, or otherwise, it should happen that he should become a bankrupt or insolvent, and, after the death of Spurrier, or from and after his bankruptcy or insolvency, if such misfortune should happen, then to apply the interest of the trust fund for the benefit of the wife during her life, and, in particular, during the remainder of the joint lives of the husband and wife, to pay the interest and dividends for the separate use of Amy Garland and her children. The settlement then goes on to declare the trusts for the children after the death of the husband and wife, upon which nothing turns. Then there is a proviso that it shall be lawful for the trustees, after the death of Spurrier, or from and after his becoming a bankrupt or insolvent, and after the death of Mrs. Spurrier, to apply the whole or such part as the trustees shall think fit, of the dividends of the expectant portions of the children, for their maintenance and education. And then it is provided that, if there shall be no child of the marriage, who, by virtue of the trusts, shall become entitled to an absolute share of the trust fund, then the trustees shall stand possessed of the trust fund, in trust for the survivor of Mr. Spurrier and his wife, but in case she shall die in his lifetime, and, at her decease, or after that event, there shall be such failure of issue of the intended marriage as thereinbefore mentioned, then, if at the time of such failure of issue, Mr. Spurrier should be, or should have been a bankrupt or insolvent, 15 sixty-sixth parts of the trust fund shall be-

[1] The opinion only is here given.

long to, and be in trust for the next of kin in blood of the wife, at the time of her death. Mr. Spurrier having become a bankrupt, the bill is filed, by the trustees of the marriage settlement, for the purpose of having the rights of the parties declared.

A variety of cases, beginning with the case of *Lockyer* v. *Savage*, 2 Strange, 947, which was decided about 100 years ago, have established that, though there cannot be a settlement of the husband's own estates so as to make his life interest cease in the event of his becoming a bankrupt, in order that the benefit of the estate might be given to the wife or children of the marriage, yet the wife's estate may be so settled. That I take to be the clear rule: and it would be useless to travel through a vast number of cases by which that rule has been established, all of which may be found on referring to any of the late cases on the subject.

In this case, if, instead of expressing the mode of dealing with the wife's property and the husband's in the way in which we find it stated in this marriage settlement, it had been stated, that it had been agreed that the wife's fortune should be invested in the purchase of a certain quantity of the Three per Cent. Reduced Annuities, and that the husband should, with his own funds, purchase so much of the Three per Cent. Annuities, as that the income of the whole would yield £1,000 a year, and that then the fund should be settled in the way in which the whole of this fund is settled, nothing could be more plain than that, with respect to the wife's portion of the fund, that is, the fund purchased by the investment of her money, the settlement would be entirely good; and that, with respect to the husband's portion, the settlement would fail so far as it professed, in the event of his bankruptcy, to take away the benefit of his estate from his creditors, and to give it to his wife or children.

I apprehend that the parties to the settlement in this case, must have agreed that 15 sixty-sixths of the trust fund should, in certain events, belong to the next of kin to the wife, because they had calculated that, at the then price of stocks, the £5,000, the amount of the wife's fortune, would have purchased £7,575 Three per Cent. Reduced Annuities, which is the amount of 15 sixty-sixth parts of the whole fund. And though the parties to the settlement have not expressed that the provision in question was made on the calculation which I have suggested, I think that I am warranted in considering it to have been so made, by the course of proceeding which was adopted in the case of *Higginson* v. *Kelly*, 1 Ball & Beatt. 252, which was before Lord Chancellor Manners. In that case a person being in trade had, in consideration of £1,000, his wife's fortune, conveyed a leasehold house to trustees, for his own use till his death or bankruptcy, then, in either event, if his wife were alive, to raise £1,000 for her separate use. Lord Manners says: "The rule of law, as stated by the counsel for the plaintiffs, that a trader cannot, on his marriage, settle his property in such a manner that, in the event of his bankruptcy, his wife shall be entitled to a provision out of it, in

prejudice to his creditors, is perfectly correct, and, if they could have satisfied me that such was the case before the court, I should have no hesitation in granting the injunction. But though the property in this case, strictly speaking, is the husband's, yet it, in reality, is the fortune of the wife, intended as a provision for her and her children, in case of bankruptcy of her husband." His Lordship then says: "The same question came before me *In the Matter of Stanford*, a bankrupt: the case was, in circumstances, nearly the same as the present. I had some doubts, and finding the question had never been the subject of decision, I had a communication with Lord Eldon and Lord Redesdale upon it. I stated to them that it appeared that the intention on the executing the settlement, was that the fortune of the wife, should be a provision for her, but, through mistake, it was made to appear the property of the husband; and I submitted to them whether they were of opinion that I could so far correct the deed of settlement to meet the intention of the parties, as to amend the mistaken form of the deed, and mould it so as to be a valid settlement. Both the learned lords were of opinion that I was at liberty to do so; and I accordingly amended the settlement. I am, therefore, in this case, of opinion that the settlement must be considered as made of the fortune of the wife of the bankrupt, and that she, by means of her trustees, is at liberty to proceed at law to recover the house for the purposes of the settlement." Now I do not amend the settlement, but I am, I think, warranted, by the general tenor and substance of it, to declare that this settlement is to be considered precisely in the same manner as if the amount of the wife's fortune was £5,000 (for it is not worth while to make any distinction between the payment *in præsenti* of £4,000 and the payment of £1,000 when the wife attained the age of 21) and as if the £5,000 had been invested in the purchase of Three per Cent. Reduced Annuities, and then a settlement made of the whole fund.

If the parties wish to have that matter more rigidly inquired into, in order to ascertain, precisely, what proportion of the Reduced Annuities might have been purchased with the £5,000, I will refer it to the master to make the inquiry: but they may perhaps be content with having it declared that the 15 sixty-sixths are to be considered as that portion of the trust fund which was purchased with the wife's property, and that, as to so much of that fund, the limitation over in the event of the bankruptcy or insolvency of the husband, is good; but that, as to the remainder, it is invalid.[1]

Sir E. Sugden and *Mr. Wheatley*, for the plaintiffs, the solvent trustees of the settlement.

Mr. Knight and *Mr. Turner*, for the defendants, Mrs. Spurrier and her infant child.

Mr. Peppys, *Mr. Ellison*, and *Mr. Jacob*, for the assignees.

Mr. Wood appeared for the defendants, Jolliff and W. J. Spurrier.

[1] See *Matter of Meaghan*, 1 Sch. & L. 179 (1803).

ROCHFORD *v.* HACKMAN.

CHANCERY. 1852.

[*Reported* 9 *Hare*, 475.]

A CLAIM, filed by William James Rochford and Martha Ann his wife, against Hackman and another, the personal representatives of William Rochford, the testator in the cause, — English the assignee under the insolvency of Richard Rochford the elder, the son of the testator, and Richard Rochford the younger, the son of Richard Rochford the elder, for the purpose of having the trusts of the will of the testator, so far as respected the sum of £1900 Consols, executed under the direction of the court, and to have one moiety of that sum transferred to the plaintiffs, and the other moiety secured in court for the benefit of the parties interested therein. The plaintiff Martha Ann Rochford was one of the children of Richard Rochford the elder, the insolvent, and had attained twenty-one. The defendant Richard Rochford the younger was his only other child, and was still an infant.

William Rochford the testator, by his will, dated the 15th of August, 1822, gave and bequeathed the residue of his personal estate to Samuel Groves and Thomas Hackman, upon trust, to permit and suffer or authorize and empower his wife to receive the income for her life, and after her decease, as to one fourth part of the residue, upon trust, to pay to, or permit and suffer, or authorize and empower, his son Richard Rochford (the insolvent) to receive the income for his life, and after his decease to transfer and pay the same to the child, if only one, and if more than one, unto, between, or amongst the children of his son Richard, share and share alike, to be vested interests in such child or children, as and when he, she, or they respectively should attain twenty-one, with survivorship as to the shares of children dying under twenty-one, and with a direction that the income of the shares of the children, or so much thereof as the trustees should think fit, should be applied for their maintenance during their minorities; and as to the other three fourths of the residue, after the death of the wife, the testator declared similar trusts, — as to one fourth, in favor of his son James and his children; as to another fourth, in favor of his son William and his children; and as to the remaining fourth, in favor of his son John and his children. And he then provided, that, in case any or either of his said four sons should die without leaving any child or children him or them surviving, or, being such, in case all of them should happen to die under the age of twenty-one, that the part or share, parts or shares, intended for such of his said son or sons so dying as aforesaid, and his or their respective issue as aforesaid, should be divided into as many shares as should be equal to the number of his son or sons who should be then living, or, being then dead, should

have left a child or children living at his or their death or respective deaths; and thereupon, such shares should be and remain upon such trusts for his said surviving other sons and their children respectively as were thereinbefore declared with respect to the original shares. And the will contained the following clause: "And my further will is, and I do hereby expressly declare and direct, that in case my said wife, or any of my said four sons, shall in any manner sell, assign, transfer, encumber, or otherwise dispose of or anticipate all or any part of her, his, or their share and interest of and in the said dividends, interest, and annual proceeds aforesaid, then and in such case, and from and immediately after such alienation, sale, assignment, transfer, or disposition shall be made, the said several bequests so hereinbefore made to or in trust for him and them as aforesaid shall cease, determine, and become utterly void to all intents and purposes, as if the same had not been mentioned in or made part of this my will, and as if my said wife or either of my said sons were dead."

The testator died in September, 1831; and his wife in October following. Two of the sons, William and John, subsequently died without leaving any issue.

The residue of the testator's estate was invested in the purchase of £3800 Consols, and the moiety of that sum (which was the subject of the claim), in the events that had happened, stood limited by the will to Richard Rochford, the insolvent, and his children. Richard Rochford, the insolvent, received the dividends of this moiety up to the 10th of October, 1850; but, on the 14th of December, 1849, being then a prisoner in actual custody for debt in the debtors prison for London and Middlesex, he presented his petition to the Court for Relief of Insolvent Debtors for his discharge from such custody, according to the provisions of the Act 1st & 2d Vict. *c.* 110. By an order of that court, dated the 17th day of December, 1849, his estate and effects were vested in the provisional assignee, and by a subsequent order of the same court the defendant English was appointed to be the assignee under the insolvency. It was admitted at the bar, that in the schedule filed by Richard Rochford in the Insolvent Court, especial reference was made to his life interest in a moiety of the residue under the testator's will, and to the provisions of the will with reference to the assignment of that interest.

The Solicitor-General and *Mr. Shebbeare*, for the plaintiffs.

Mr. De Gex, for the defendant Richard Rochford the younger.

Mr. Tripp, for the assignee of Richard Rochford the elder.

Mr. Baily, for the trustees.

THE VICE-CHANCELLOR. [SIR GEORGE JAMES TURNER.] In the circumstances of this case it is contended by the plaintiffs, and the defendant Richard Rochford the younger, that the insolvent's life interest in the £1900 Bank Three per Cent. Annuities has ceased, and that they have become presently entitled to that fund in equal shares: as to the share of the plaintiffs absolutely, and as to the share of the

defendant Richard Rochford the younger, contingently on his attaining twenty-one; but the defendant English, on the other hand, insists that he is entitled to the income of the £1900 Consols during the remainder of the life of Richard Rochford the insolvent.

In determining this question, the first point for consideration appears to me to be, whether there are any fixed rules by which the court can be guided in its determination; and upon examining the cases upon the subject, I think it will be found that there are two such rules: First, that property cannot be given for life any more than absolutely, without the power of alienation being incident to the gift; and that any mere attempt to restrict the power of alienation, whether applied to an absolute interest or to a life estate, is void, as being inconsistent with the interest given; and secondly, that although a life interest may be expressed to be given, it may be well determined by an apt limitation over.

That property cannot be given for life any more than absolutely, without the power of alienation being incident to the gift, appears to me to be well settled by the cases of *Brandon* v. *Robinson*, 18 Ves. 429; and *Graves* v. *Dolphin*, 1 Sim. 66. In both those cases there were gifts for life, with provisions which were directed against alienation, but in neither of them was there any proviso for determining the life interest, or any gift over in the event of alienation; and the court in each of those cases held that the life interest continued; and these cases are not, so far as I am aware, contravened by any other authority.

That, in cases where a life interest is expressed to be given, it may be well determined by an apt limitation over, is, I think, equally well settled by many authorities: *Wilkinson* v. *Wilkinson*, 3 Swanst. 515; *Cooper* v. *Wyatt*, 5 Madd. 482; *Yarnold* v. *Moorhouse*, 1 Russ. & My. 364; *Kearsley* v. *Woodcock*, 3 Hare, 185; *Martin* v. *Margham*, 14 Sim. 230; *Brandon* v. *Aston*, 2 Y. & C. C. C. 24; and *Churchill* v. *Marks*, 1 Coll. 441.

It was insisted, however, at the bar, that a further rule was to be deduced from the cases, namely, that a limitation over was in all cases essential to the determination of the life interest; and the case of *Dickson's Trust*, 1 Sim. N. S. 37, was relied on for that purpose. For the reasons which I shall presently give, I do not think it necessary now to decide that point; but it may be well to observe upon it, that I do not understand the case of *Dickson's Trust* to have decided that the life interest would not be well determined by a proviso for cesser, though not accompanied by a limitation over; and that I do not think that any such rule is to be collected from the cases. The true rule I take to be this: The court is to collect the intention of the testator, whether his intention was that the life interest should not continue; and it is to collect that intention from the whole will, looking to the primary disposition, for the purpose of seeing to what extent the interest is given, and to the ulterior disposition, for the purpose of seeing to what extent and in what events the primary disposition is

defeated. If, on the one hand, the court, upon this examination, finds that there is a limitation over, and that it meets the event which has occurred, it is plain that the testator did not intend the life interest to continue in that event, and it ceases accordingly, as in the cases to which I have referred; but if, on the other hand, the court, upon the examination, finds that the limitation over does not meet the event which has occurred, there is no evidence of the testator's intention that the life interest should not continue in that event, and it therefore continues, as in *Lear* v. *Leggett*, 1 Russ. & My. 690, and *Pym* v. *Lockyer*, 12 Sim. 394. This view of the cases appears to me to remove all difficulty upon them, and it falls in with the case of *Dommett* v. *Bedford*, 6 T. R. 684, in which the life interest was held to cease upon the proviso for cesser without any gift over. I think, indeed, it would be difficult to hold that any greater effect can be due to the limitation over than to the express declaration of the testator that the life interest should cease.

Some observations which fell from Lord Eldon upon this question in the leading case of *Brandon* v. *Robinson*, 18 Ves. 429, appear to me to have been to some extent misapprehended, and I will venture therefore to make some few observations upon that case. Lord Eldon, in that judgment, first observes, that a disposition to a man until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give to him for his life, with a proviso that he shall not sell or alien (Id. 432, 433); and the distinction between the two cases is obvious. In the former case the disposition could not possibly endure beyond the bankruptcy. In the latter, it would, if the law did not allow the proviso, or if the proviso was not couched in terms calculated, in the events which happened, to defeat the life interest; but I do not understand Lord Eldon to say, that the law does not allow the proviso. On the contrary, he expressly says, that if the proviso be so expressed as to amount to a limitation reducing the interest short of a life estate, neither the man nor his assigns can have it beyond the period limited; and we have here, therefore, his distinct opinion that upon a proviso so expressed the life interest would cease. He then passes to the case of *Foley* v. *Burnell*, 1 Bro. C. C. 274, and to the old form of trusts for the separate use of married women, for the purpose of showing that the power of disposition accompanied the interest unless an available restriction was imposed; and he then proceeds to the particular case which he had under his consideration, and, having first shown that the life interest was the property of the bankrupt, goes on to inquire whether there was enough in the will to show that it could not be assigned under the Commission of Bankruptcy; on which he observes, that, "to prevent that, it must be given to some one else," meaning, as I understand the judgment, not that in all cases there must be a gift over to prevent the assignees from taking; but that, under the provisos of that particular will the assignees must take in the absence of such a gift over; as was clearly the case, according to

the tenor of the previous part of his judgment, there being no proviso determining the life interest; and that this was Lord Eldon's meaning is, I think, apparent, both from what precedes and what follows upon the passage in question; for in what precedes he refers to the provisions of the whole will, and in what follows he adverts to the question whether the restrictions contained in the will could be construed into a limitation giving the interest to the residuary legatee. Lord Eldon's judgment in *Brandon* v. *Robinson* does not, therefore, appear to me to go to the extent of deciding that in all cases there must be a gift over in order to determine the life interest.

In the present case, however, I do not, as I have already observed, think it necessary to determine that question. I am of opinion that the testator in this case has not merely provided for the cesser of the life interest, but has made a valid gift over; and I think so for this reason: According to the general rule, some effect must, if possible, be given to all the words of a will; and I see no effect which can be given to the words which follow on the cesser of the life interest, unless they be construed to operate the limitation over, for the cesser or determination of the life estate was effected by the previous provisions.

Some observation was made in the course of the argument upon the terms in which this limitation over is expressed, "as if the same had not been mentioned in or made part of this my will, or as if my said wife, or either of my said sons were dead;" but on looking at the previous provisions of the will, I think there is no difficulty in understanding what the testator here intended. In the event of any of the sons dying without leaving children, he had given over their fourths to the other sons and their children; and what I take him to have meant by this clause is, that the words "as if the same had not been mentioned in the will" should apply to the event of there being no children, and the words "as if they were dead" to the event of there being children. I am also of opinion that the event has occurred on which this limitation over was to take effect. I think the case in that respect is completely governed by *Shee* v. *Hale*, 13 Ves. 404; *Martin* v. *Margham*, 14 Sim. 230; *Brandon* v. *Aston*, 2 Y. & C. C. C. 24; and *Churchill* v. *Marks*, 1 Coll. 441; and is not affected by *Lear* v. *Leggett*, 1 Russ. & My. 690, and *Pym* v. *Lockyer*, 12 Sim. 394; the alienation in the two latter cases being compulsory, and in the former voluntary.

A learned text writer has, I observe, expressed some doubt upon the soundness of this distinction between compulsory and voluntary alienations; but I see no reason for the doubt. It cannot, I think, be said that a man has alienated when the alienation is made by the act of the law and not by his own act; and if he has not alienated, there is no breach of the condition, and the life estate is not determined. The conclusion, therefore, at which I have arrived in this case is, that the life interest of the insolvent is determined; and the remaining questions then are, whether the capital ought now to be divided, and how the income of it from the date of the insolvency is to be dealt with.

I think that the capital cannot now be divided; for I think that the determination of the life interest does not alter the class who are to take the capital, and that any after-born child of the insolvent attaining twenty-one will be entitled to share in it. The object of the proviso is to determine the life interest as to the beneficial enjoyment of the insolvent: and to hold it to be determined so as to alter the rights of his children would be to carry it beyond its object. The result, I think, is, that the plaintiff Mrs. Rochford has a vested interest in a moiety of the £1900 Consols, and the defendant Richard Rochford has a contingent interest in the other moiety; but that both these interests would open, so as to let in any after-born children of the insolvent: and this being the result, I think that Mrs. Rochford is entitled to receive the interest of her moiety. The case, in this respect, seems to me to stand upon the same footing as the case of a vested interest liable to be divested, and in that case the party entitled to the vested interest is, as I apprehend, entitled to the income. The income of the other moiety must, I think, be accumulated.[1]

SYNGE *v.* SYNGE.

IRISH CHANCERY. 1855.

[*Reported* 4 *Ir. Ch.* 337.]

LADY HUTCHINSON, by her last will, bearing date the 5th day of April 1827, bequeathed £2564 11*s.* 5*d.* bank stock, and £5809 16*s.* 4*d.* Government £3¼ per cent. stock, of which she was then possessed, to trustees, on trust to permit Edward Synge, one of the respondents, to receive the annual produce thereof during his life, and after his death on trust for certain other persons. After her death he received the dividends on both stocks. On the 1st of August 1839, he mortgaged certain property to the petitioner Francis Synge, for £10,800, which sum he covenanted by the mortgage deed to pay on the 1st of August 1840; and on this covenant Francis Synge, in or as of Easter Term 1850, obtained a judgment against him. In the month of May 1852, by an indenture made between the said Edward Synge of the first part, the respondent William D. Latouche of the second part, and several judgment creditors prior to the petitioner, of the third part; and reciting the obtaining of the judgments against Edward Synge, and his inability to satisfy his creditors, and that they had issued executions against his person, which they undertook to withdraw on the execution of the deed; Edward Synge assigned, among other things, his life interest in the Government and bank stock beforementioned, to the said William D. Latouche, on trust as to most of the

[1] *See Hurst v. Hurst*, 21 Ch. Div. 278 (1882).

property, for the benefit of Edward Synge's creditors; but as to a portion of it (comprising among other things a sum of £1846 bank stock, representing part of Lady Hutchinson's bequest), on trust to allow the respondent Edward Synge himself to receive the annual income of it until he should become bankrupt or insolvent, or should attempt to assign his interest therein, or until any creditor of his should do any act for the purpose of having the dividends or interest applied in satisfaction of his particular debt; but on the happening of any of these events, then on trust to apply the annual income of the property in a certain specified manner for the benefit of the creditors. In Michaelmas Term 1852, the petitioner Francis Synge, having previously revived his judgment, applied, under 3 & 4 Vic. *c.* 105, ss. 23, 24, for a charging order on the interest of the respondent Edward Synge, in the Government and bank stock, under the will of Lady Hutchinson. The respondent William D. Latouche, as trustee for the creditors, resisted that application, relying on the provisions of the deed; but the *Master of the Rolls*, nevertheless, made a charging order, leaving the parties to ascertain, as they might be advised, what Edward Synge's interest was. The petitioner, therefore, on the 15th day of November 1853, filed the present cause petition, charging that the respondent Edward Synge had no other property to meet the demands upon him; and praying for a declaration that the limitation over from Edward Synge, contained in the trust deed, was void as against the petitioner, and that the petitioner was entitled to have the annual proceeds of the sum of £1846 (intended to be subject to that limitation) applied during the life of Edward Synge in discharge of the petitioner's demand, and for an account.

Mr. F. A. Fitzgerald (with whom was *Mr. H. Leslie*), for the petitioner.

The Lord Chancellor [Brady] stopped the argument for the petitioner, and called on

Mr. Otway and *Mr. Edward D. Latouche,* for the trustee for the schedule creditors.

(Edward Synge did not appear by counsel.)

The Lord Chancellor. I think this a very plain case. Mr. Latouche has argued as if the rule forbidding provisos of this kind was confined to limitations over in case of bankruptcy or insolvency; but I do not agree with him in that; I think this clause is as clearly void as if bankruptcy or insolvency were the case attempted to be provided against.

Here, there was a fund in which the respondent had an interest, which was liable to a kind of execution at the suit of his judgment creditor, and which he transfers to trustees upon trust for himself, until some creditors should proceed to attach it; and upon that event, in trust to transfer it to certain creditors who executed a particular deed. It has been urged, and no doubt the fact is, that the provision was in favor of existing fair creditors; but I do not think that is sufficient to

sustain the limitation. In a court of law, if one creditor were to issue a writ of *fieri facias*, and to lodge it with the sheriff, but at the same time to direct him not to sell until another writ came in, and so to try to keep the execution suspended over the effects of the debtor for his protection, it is well settled that a subsequent creditor might take out a writ, and compel the sheriff to sell and realize the amount of his debt for him, in priority to the party who delayed his sale, though the execution of the latter was the first lodged. What then would a court of law say of a case like this? What would a court of law say of a bill of sale on an execution, in which it was declared that the debtor should be left in possession of the chattels until some creditor should issue another writ? Would such a transaction as that be supported against a subsequent execution? No such case has ever been heard of, as far as I remember, in a court of law, and certainly none such has been now cited. We have, on the contrary, the actual decisions to which I have referred, and which appear to my mind to be the most analogous to the present case, viz., those upon the priorities of execution creditors, in which it has long been decided, that a creditor who wilfully delays his levy is displaced by another who insists on his writ being executed. If the limitation in this case were supported, creditors seeing a man in apparently affluent circumstances might give indulgence, and delay pressure on him, on the supposition that they could realize their debts out of his property; and then when they came to make that property available, they might find that it had previously passed under a secret deed to third parties who had merely forborne for a time, by a like secret contract with the debtor, to act upon their rights.

It was much pressed by Mr. Latouche, that this in truth was a bounty flowing from the creditors who executed the deed, and that they had a right (on the authority of the cases cited by him) to give up their property until the events mentioned here should take effect, and then to take it back again. The argument does credit to the ingenuity of counsel: but there is considerable difference between being the actual owner of property, and having a right to seize or attach it by execution; and it seems to me that the deed is plainly calculated to enable the respondent to commit a fraud on his creditors, and to injure parties who might trust him on the faith of his apparent possession of property. The expressions of Lord Lyndhurst, in *Phipps* v. *Ennismore*, 4 Russ. 131, are perfectly applicable to this case. He says: "It is admitted on all hands that the parties to the deed did not contemplate a fraud; but the transaction is in its very nature fraudulent. Though the parties had no fraud in view, the deeds themselves are fraudulent." I think that this case is, if it be possible, almost a clearer case than it would be if the respondent had become insolvent or bankrupt, and that these provisions cannot be sustained. I must therefore make an order according to the prayer of the petition, and the petitioner's costs are to be paid out of the fund along with his demand.

BROOKE *v.* PEARSON.

CHANCERY. 1859.

[*Reported* 27 *Beav.* 181.]

IN 1854, William Pearson married Elizabeth Josselyn. He was seised of a real estate of the value of about £17,400, subject to a mortgage of £5,000, and the portion of his intended wife consisted of £1,000. A settlement was executed prior to the marriage, and dated the 18th of May, 1854, which recited, that "upon the treaty for the intended marriage it was agreed, that the fortune or portion of Elizabeth Josselyn, amounting to the sum of £1,000, should be paid or made over to William Pearson, and that William Pearson should be entitled to receive, for his own use, whatever personal estate should happen, legally or equitably, to be given or come to or devolve on Elizabeth Josselyn during her intended coverture; and that in consideration of the premises he should" settle his real estate upon the trusts thereinafter declared. It then witnessed, that in consideration of marriage, and of the £1,000 paid to William Pearson, he conveyed his real estate to trustees, upon trust during the joint lives of William Pearson and Elizabeth Josselyn, to pay all the rent thereof to William Pearson, "until he should sell, mortgage, assign, charge, or in any way encumber, all or any part of the same rents, issues and income before the same should have become due and payable, or (whichever event should first happen) until there should be an assignment, in fact or by operation of law, of all or any part of the rents, issues and income, by reason of the *bankruptcy* or insolvency of William Pearson, or otherwise howsoever. And from and immediately after William Pearson should sell, mortgage, assign, charge or in any manner encumber all or any part of the said rents, issues and income before the same should have become due and payable, or there should be an assignment, in fact or by operation of law, of all or any part of the rents, issues and income by reason of the *bankruptcy* or insolvency of William Pearson, or otherwise howsoever, then upon trust, that, during the joint lives of William Pearson and Elizabeth Josselyn, the said trustees or trustee for the time being should, from time to time, retain" £300 out of the rents, and pay that sum yearly to Elizabeth Josselyn, for her separate use without power of anticipation, and pay the residue of the rents to Wm. Pearson. Then followed trusts for the benefit of the wife and children of the marriage, which it is unnecessary to state in detail.

The marriage took effect, and there were issue three children.

By indenture dated the 28th of July, 1855, Wm. Pearson conveyed the property to Bennet and another, by way of mortgage to secure £2,000.

On the 8th of April, 1858, Wm. Pearson conveyed also his real and personal estate to a trustee for the benefit of his creditors, and in July following he was adjudged bankrupt.

The trustees of the settlement sold the estate for £17,400, but being unable to complete, in consequence of the disputes, they filed this bill against Pearson and his wife, children, assignees and mortgagees, to have the rights and interests of the several parties determined.

Mr. Lloyd and *Mr. Whitbread*, for the plaintiffs the trustees.

Mr. Selwyn and *Mr. Woodroffe*, for the assignees in bankruptcy.

Mr. Follett and *Mr. Turner*, for the mortgagees.

Mr. R. Palmer and *Mr. Regnier Moore*, for the wife and children.

THE MASTER OF THE ROLLS. [SIR JOHN ROMILLY.] I am of opinion that this is a good rent-charge of £300.

I at one time thought that this clause in the settlement was void *ab initio*, and if so, the validity of the rent-charge could not depend on the circumstance whether the bankruptcy occurred before or after the rent-charge came into existence. But, on consideration, I am of opinion that this is not so, and that the limitation of the rent-charge to the wife was not void in the first instance; but that the question is, whether the rent-charge was in existence at the time when bankruptcy took place? Supposing the case had been this: — that upon the bankruptcy or insolvency, or upon any assignment by operation of law, the annuity of £300 a year was to be raised out of the husband's estate, for the separate use of the wife, without power of anticipation. There can be no question that there was good consideration for the settlement; but what occurs upon the bankruptcy of the husband is this: all his property passes to his assignees, and there remains nothing out of which the rent-charge can be raised. The court has, however, held, even in these cases, that all money which comes from the wife must be replaced and restored to her.

Here, the rent-charge was to arise on the husband mortgaging the property, or upon an assignment by deed, or by operation of law, by reason of the bankruptcy of Mr. Pearson. That being the clause in settlement, when he mortgaged the property the rent charge arose, and was, therefore, in existence at the time of the bankruptcy. It is not necessary to go into the question, whether the rent-charge has priority over the mortgage, because that matter is arranged between the parties; but I am of opinion, that the rent-charge was in existence at the time of the bankruptcy, and therefore that it did not pass to his assignees as part of his property.

I am of opinion, therefore, that this is a good and subsisting rent-charge, notwithstanding the fact that the husband has become bankrupt, and all the rest of the property passed to assignees. I will make a declaration to that effect.

KNIGHT *v.* BROWNE.

CHANCERY. 1861.

[*Reported* 30 *L. J. N. S. Ch.* 649.]

THIS suit was instituted, by Mrs. Knight, against the trustees and others claiming the rents and profits of the property settled by her marriage settlement, for the purpose of obtaining a declaration that she was herself, in the events that had happened, entitled to those rents and profits.

By a voluntary deed, dated the 30th of September, 1851, Thomas Charles Knight conveyed to the plaintiff, who was then unmarried, a dwelling-house and premises in fee. He afterwards married her, and by the settlement made on the marriage, dated the 2d of September, 1853, these premises, together with other property belonging to T. C. Knight, were conveyed to trustees in fee, upon trust (after the solemnization of the marriage), to pay the rents, issues and profits thereof unto, or permit the same to be received by the said T. C. Knight until he should be duly found and declared a bankrupt, or until he should seek relief or protection under or take the benefit of any Act or Acts of Parliament for the relief or protection of insolvent debtors, or should execute any deed or deeds of composition with all or any of his creditors, or should by any deed or deeds, instrument or instruments, or in any manner or by any means whatsoever, mortgage, charge, convey away, alien, or otherwise dispose of or encumber all or any part or parts of the said hereditaments and premises, or any of them, or the rents and profits thereof, or of any part thereof, or any interest therein, to or in trust for or in favor of any persons or person whomsoever, or should by his own act, or by operation of law or otherwise, cease to be entitled to the personal enjoyment of all or any parts or part of the same hereditaments and premises, or the rents and profits thereof, or any part thereof, or should depart this life (whichever of such events should first happen), and from and immediately after the occurrence of any such event as aforesaid, to pay the rents, issues and profits of the said hereditaments and premises unto such person or persons only, and to and for such intents and purposes, and in such manner only as the plaintiff, notwithstanding coverture, should from time to time, and not in any mode of anticipation, direct or appoint, and in default of and until any such direction or appointment, and subject thereto, into her proper hands, for her own sole, separate and exclusive use, independently of the debts, contracts, engagements, control, interference or intermeddling of her intended or any future husband.

The marriage was celebrated shortly after the date of this deed.

On the 6th of August, 1858, T. C. Knight being in custody for debt, the detaining creditor obtained a compulsory vesting order of the Insol-

vent Debtors Court, under the 30th section of the 1 & 2 Vict. *c.* 110, vesting all the real and personal estate and effects of the prisoner in the provisional assignee. This order was discharged on the 30th of September, with the consent of the creditor, the prisoner having been discharged from custody without taking the benefit of the Act.

The plaintiff at first claimed that her husband's interest in the settled property became forfeited on the vesting order being made, and notwithstanding the subsequent order discharging it; but the husband having afterwards, on the 20th of October, 1858, mortgaged his life estate and interest to the defendant J. Clark, the plaintiff contended that, at all events, by this dealing with the property, her husband's interest was forfeited from the date of the mortgage.

Subsequently to the mortgage, several judgments were obtained and registered against T. C. Knight, and it was principally for the purpose of protecting the property against these judgments that the suit was instituted.

Mr. Rolt and *Mr. Hislop Clarke*, for the plaintiff.

Mr. Giffard, *Mr. R. W. E. Forster*, *Mr. Caldecott*, and *Mr. J. J. Smale*, for the various defendants.

Wood, V. C. It has been settled ever since the case of *Lockyer* v. *Savage*, 2 Str. 947, that where a person attempts to limit his own property to himself for life, with a provision that it shall go over on bankruptcy, such a provision is void as against the bankrupt's assignees; and in Ireland the same rule has been applied in cases of insolvency. Mr. Swanston, in his learned note to *Wilson* v. *Greenwood*, 1 Swanst. 471, 481, says, "The general distinction seems to be, that the owner of property may, on alienation, qualify the interest of his alienee by a condition to take effect on bankruptcy; but cannot, by contract or otherwise, qualify his own interest by a like condition determining or controlling it in the event of his own bankruptcy, to the disappointment or delay of his creditors; the *jus disponendi* which for the first purpose is absolute, being in the latter instance subject to the disposition previously prescribed by law." The rule, as I said before, has been extended in Ireland to cases of insolvency; but it has never before been attempted to apply it to a case of voluntary alienation. What fraud is there on anybody in a person settling his property on himself until he shall make some attempt to hand it over to another — in consideration of marriage, it may be, or for any other consideration? That anybody can be deceived by it, is out of the question. The clause of forfeiture is contained in the very deed by which the life interest is created; and the case is very different from *Phipps* v. *Lord Ennismore*, 4 Russ. 131, where the trusts to take effect upon alienation were contained in a separate deed, by which the trustees had an option to apply the income for the benefit of the settlor himself, or his wife or children. Lord Lyndhurst there held, that the transaction was in its very nature fraudulent, and the deed could not be supported. But the very point in this case has been decided by the Master of the Rolls in *Brooke* v.

Pearson, 5 Jur. N.S. 781, where the husband's property was settled in trust for the husband, during the joint lives of himself and his wife, until he should sell, mortgage, assign, charge or in any way encumber all or any part of the income before the same should become due, &c.; and then upon trust to retain £300 a year, and pay the same to the wife to her separate use, without power of anticipation. The husband afterwards mortgaged his interest, and the Master of the Rolls held, that the title of the wife vested on the execution of the mortgage. There will be a declaration that the plaintiff, upon the mortgage to Clark, became entitled for her separate use to the income of all the property included in the settlement from the date of the mortgage; with an account of the rents from the date of the mortgage, the trustees retaining thereout their costs of the suit; and the costs of the suit, including the costs retained by the trustees, must be paid to the plaintiff by the defendants.

IN RE PEARSON.

CHANCERY DIVISION. 1876.

[*Reported* 3 *Ch. D.* 807.]

THIS was an appeal from the decision of the registrar of the Tunbridge Wells County Court, acting as judge.

On the 6th of January, 1858, an indenture was executed between John Pearson of the one part, and Edward Hodge and Henry Hodge of the other part, by which, after a recital that John Pearson had recently come into possession under the will of his father of (amongst other things) the sum of £1,000, and, being free from debts and liabilities, was desirous of settling the same for the benefit of himself and his wife and family in manner thereinafter appearing, and that the £1,000 had been paid over by Pearson to Edward Hodge and Henry Hodge, it was witnessed that, in consideration of the natural love and affection which Pearson bore towards his wife and children, it was declared and agreed that Edward Hodge and Henry Hodge, their executors, and administrators, and assigns, should stand possessed of the £1,000, upon trust to invest the same as therein mentioned, and to pay the income to Pearson until he should assign, charge, or otherwise dispose of the same by way of anticipation, or until he should be found or declared a bankrupt, or become an insolvent debtor within the meaning of some Act of Parliament for the relief of insolvent debtors, or until he should do any other act, or any other event should occur, whereby the same income, if payable to himself, would become vested in some other person or persons, or until his death, which should first happen. But if Pearson should assign, charge, or otherwise dispose of the same income by way of

anticipation, or should become or be declared a bankrupt, or become an insolvent debtor within the meaning of some Act of Parliament for the relief of insolvent debtors, or if he should do some other act, or any other event should happen whereby the same income, if payable to himself, would become vested in some other person or persons, then upon trust that the trustees or trustee should thenceforth pay the income unto Elizabeth, the then present wife of John Pearson, for her life, for her separate use without power of anticipation. And, subject to these trusts, the whole of the trust fund was to be in trust as therein mentioned for the children or remoter issue of John Pearson and Elizabeth his wife, as they, or the survivor of them, should appoint, and in default of appointment for the children who should attain twenty-one or marry, in equal shares. The ultimate limitations were, in case John Pearson should survive his wife, upon trust for him absolutely, and, in case he should die in her lifetime, upon such trusts as he should by deed or will appoint, and in default of appointment for his next of kin, according to the Statute of Distributions, excluding the wife.

John Pearson was not a trader at the date of the execution of the settlement. He did not commence to trade until the beginning of the year 1873, when he became tenant of a public-house, and engaged in the business of a licensed victualler. On the 13th of December, 1875, he was adjudicated a bankrupt. At this time the wife was dead, but there were two children of the marriage living, who were under the age of twenty-one. The trustee in the bankruptcy applied to the court for an order declaring the settlement void as against the creditors. There was no evidence to show that Pearson was insolvent at the date of the execution of the deed: in fact it was admitted that he owed no debts at that time. The registrar dismissed the application. The trustee appealed.

Doria and *E. C. Willis*, for the appellant.

Finlay Knight and *E. Baldock Stone*, for the trustees of the settlement.

BACON, C. J. This deed is plainly fraudulent upon the face of it. What is the meaning of it? The settlor in effect says, "I have got £1,000; I do not intend my creditors to have a farthing of it; and to accomplish that purpose I will settle it in such a way that, if by any accident my creditors should hereafter have a claim to it, it shall go to some one else." That is as plainly fraudulent as possible. Sect. 91 of the Bankruptcy Act has nothing to do with the case. Nor has the case of *Knight* v. *Browne*, 30 L. J. (Ch.) 649, any application, for it related to a marriage settlement. In the present case I think that the settlement is plainly fraudulent, for the law says that it is fraudulent for a man so to deal with his property as to disappoint the just claims of his creditors. The deed must be declared void, but the costs of all parties must be paid out of the fund.

IN RE DETMOLD.

CHANCERY DIVISION. 1889.

[*Reported* 40 *Ch. D.* 585.]

ORIGINATING summons to determine whether a forfeiture clause in a settlement was valid.

By a marriage settlement dated the 24th of August, 1881, it was declared that a sum of stock already transferred by the husband to the trustees of the deed should be held by them upon trust to pay the income to the husband "during his life, or till he shall become a bankrupt, or shall assign, charge, or encumber the said income, or shall do or suffer something whereby the same, or some part thereof, would through his act, default, or by operation or process of law, if belonging absolutely to him, become vested in or payable to some other person or persons;" and from and after the determination of the aforesaid trust in favor of the husband the trustees were to pay the income to the wife during her life, for her separate use. On the 8th of June, 1888, a creditor recovered a judgment for debt against the husband, and on the 13th of July he obtained an order in the action, restraining the trustees from paying the income to the husband. On the 19th of July the creditor obtained an order in the action, appointing himself receiver of the income due or becoming due upon and arising from the stock comprised in the settlement. This order was made in the presence of the husband. On the 25th of September, 1888, a receiving order in bankruptcy was made against the husband, and he was afterwards adjudicated a bankrupt upon an act of bankruptcy committed on the 29th of July. The question was, whether the forfeiture had taken effect in favor of the wife, or whether the forfeiture clause was void as against the trustee in the bankruptcy.

Beddall, for the plaintiff.

Cozens-Hardy, Q. C., and *Robert Morris*, for the wife.

Bethune Horsbrugh, for the receiver under the order of the 19th of July.

Muir Mackenzie, for the trustee in the bankruptcy.

NORTH, J. The question is, whether the life interest given by the settlement to the wife is now subsisting, or whether it is invalid as against the trustee in the bankruptcy of the husband. In my opinion the wife's life interest is valid as against the receiver appointed by way of equitable execution by the order of the 19th of July, because he was merely a particular creditor. A settlement by a man of his own property upon himself for life, with a clause forfeiting his interest in the event of alienation, or attempted alienation, has never, so far as I know, been defeated in favor of a particular alienee; it has only been defeated in favor of the settlor's creditors generally, on the ground that it would

be a fraud on the bankrupt law. Under the trusts of this settlement the wife is now clearly entitled to the income, if the prior life interest given to the husband has legally come to an end. In my opinion the appointment of a receiver by the order of the 19th of July established that the husband had done or suffered something whereby the income of the trust fund, or some part thereof, "would through his act, default, or by operation of law, if belonging absolutely to him, become vested in or payable to some other person." It was a decision arrived at in the presence of the husband that, as between him and the judgment creditor, the income belonged to the latter. The trustee in the bankruptcy is also bound by that order, because the bankruptcy did not commence until the 29th of July. Before that date the husband had done an act, had suffered something, by which the right to receive the income had become vested in another person, and, therefore, the gift over in favor of the wife had taken effect. It is said that a gift over of a man's own property in the event of his bankruptcy is void, and no doubt that is so. But it has been held that a gift over in the event of a voluntary assignment by him is valid. This was established by *Brooke* v. *Pearson*, 27 Beav. 181, and *Knight* v. *Browne*, 9 W. R. 515, and I think the principle of those decisions applies to an involuntary alienation by operation of law in favor of a particular creditor. The distinction between those cases and a clause of forfeiture in the event of an alienation in favor of creditors generally resulting from bankruptcy, was pointed out by Vice-Chancellor Bacon in *Ex parte Stephens*, 3 Ch. D. 807. In my opinion, those authorities show that the limitation of the life interest to the settlor was validly determined by the fact that, in consequence of the order appointing the receiver, he ceased to be entitled to receive the income. This took place before the commencement of the bankruptcy, and, therefore, the forfeiture is valid as against the trustee in the bankruptcy.

NOTE. — On annuities forfeitable on bankruptcy or alienation, see Gray, Restraints on Alienation, §§ 83-89.

SECTION II.

RESTRAINTS ON ALIENATION.

A. *Estates of Inheritance.*

PIERCY *v.* ROBERTS.

CHANCERY. 1832.

[*Reported* 1 *Myl. & K.* 4.]

THOMAS ROBERTS, by his will dated the 18th of January, 1829, bequeathed to his executors the sum of £400 upon trust, to pay, apply, and dispose thereof, and of the interest and produce thereof, to and for the sole use and benefit of his son, Thomas Jortin Roberts, in such smaller or larger portions, at such time or times immediate or remote, and in such way or manner as they the said executors, or the survivor of them, or the executors or administrators of such survivor, should in their judgment and discretion think best: and, after bequeathing to his executors the further sum of £400 upon similar trusts, for the benefit of his son John Prowting Roberts, the testator proceeded as follows: — "And, in case of the deaths of either or both of my said sons, Thomas Jortin and John Prowting, before the whole of the said several sums of £400 and £400, and the interest thereof respectively, shall have been paid or applied for the purposes aforesaid, then I will and direct that the unapplied part or parts thereof respectively shall sink into and become part of my residuary personal estate, and go and be applied therewith as hereinafter mentioned:" and the testator thereby appointed his wife, Ann Roberts, his residuary legatee, and the said Ann Roberts and John Jortin executors of his said will.

The testator died in July 1829, and in May 1830 the testator's son Thomas Jortin Roberts took the benefit of the Insolvent Debtors' Act. Previously to May 1830, Thomas Jortin Roberts had received several sums from the executors, amounting in the whole to £156; and since that period, and before the filing of the bill, he had received several other sums, amounting together to £112. The bill was filed by the assignee of the insolvent's estate against the executors of the testator, to recover the legacy of £400 and the interest thereof, or so much thereof as remained unpaid at the time of the discharge of the legatee under the Insolvent Debtors' Act.

Mr. Bickersteth and *Mr. Girdlestone, Jun.*, for the plaintiff.

Mr. Pemberton and *Mr. Elderton* for the defendants.

THE MASTER OF THE ROLLS. [SIR JOHN LEACH.] The question is, whether this legacy passed to the assignee of the insolvent upon the insolvency of the legatee; or whether it may remain in the hands of

the executors, to be applied, at their discretion, for the benefit of the legatee. The insolvent being the only person substantially entitled to this legacy, the attempt to continue in him the enjoyment of it, notwithstanding his insolvency, is in fraud of the law. The discretion of the executors determined by the insolvency, and the property passed by the assignment.

A preliminary objection was taken to this suit by the defendants, on the ground that it had been instituted without the consent of the major part in value of the creditors, at a meeting convened by advertisement for that purpose, as required by the 1 G. 4, *c.* 119. The bill alleged, that the plaintiff had been duly authorized to institute the suit with such consent, but this allegation was not proved; and it was objected at the hearing, by the defendants, that the consent of the creditors not being proved, the bill must be dismissed.

His Honor would not allow the suit to be stopped by this objection, but directed the point to be argued on a future day.

On this day (Nov. 12) the point was accordingly argued by *Mr. Bickersteth*, for the plaintiff, and by *Mr. Pemberton*, for the defendants.

The Master of the Rolls said he had a strong recollection of having been spoken to by Chief Baron Alexander on this point. His opinion was very much in favor of the plaintiff. By the clause in question the legislature plainly intended to benefit the creditor; not to give an advantage to the debtor. If the suit were successful, the creditors would take the benefit; if it were unsuccessful through the fault of the assignee, they would have their remedy against the assignee. As it was desirable, however, that the rule should be uniform, he would not decide the point without conferring with some of the judges of the common law courts.

On this day (Dec. 14) his Honor delivered judgment to the following effect: —

I have had the opportunity of conversing with some of the judges at common law upon the point, and their impression is, according to the inclination of opinion which I expressed at the hearing, that the provision made in the Statute is to be considered as made for the benefit of the creditors alone, and that it is not competent to the defendants to take advantage of the objection that the suit has been instituted without the consent of the creditors. Upon the whole, I do not now hesitate to decide that this suit can be well sustained by the assignee, and that he is entitled to the decree sought by this bill.

If there be collusion between the plaintiffs and defendant in a suit instituted by the assignees without the previous consent of the creditors, the judgment of the court will bind the interest of the creditors; but the assignees, in such case, take upon themselves the responsibility that the suit has been properly instituted and properly conducted.

KEVERN *v.* WILLIAMS.

CHANCERY. 1832.

[*Reported* 5 *Sim.* 171.]

[This case is given in the fifth volume of these Cases, p. 756.]

JOSSELYN *v.* JOSSELYN.

CHANCERY. 1837.

[*Reported* 9 *Sim.* 63.]

JAMES JOSSELYN, the testator in the cause, disposed of his residuary personal estate in the following words: "All the rest, residue and remainder of my goods, chattels, ready money, securities for moneys in the public stocks or funds, debts and all other personal estate whatsoever, I give unto John Josselyn, the son of my late cousin John Josselyn, deceased: and I order and direct my executors, or the survivor of them &c. to place the same out on government or good real security, and the interest arising therefrom, as the same shall become due, to place out on the like securities, so as to accumulate, and the principal to be paid to the said John Josselyn *at his attainment of the age of 24 years*, and to pay and allow thereout the sum of £60 per annum for the board and education of the said J. Josselyn, until his attainment of the age of 24 years: and I further empower, order and direct my said executors or the survivor of them &c., to lay out any part of the moneys, as they in their discretion may think proper, in the purchase of lands and real estate in the counties of Essex or Suffolk, for the benefit of the said John Josselyn, and to be conveyed to them accordingly: but in case the said John Josselyn shall happen to die under the age of 21 years and without leaving issue of his body lawfully begotten then living and which shall be living until his, her or their age or ages of 21 years, then I give all the residue of my goods, chattels, moneys and personal estate, and all real estate (if any) of every kind and description, unto my said brother Mark Josselyn, if he shall be then living, during his life, and, after his death, to all his children lawfully to be begotten, equally to be divided between them: but, in case my said brother shall happen to die without leaving issue of his body lawfully begotten then living, and which shall be living until his, her or their age or ages of 21 years, then I give all the residue of my goods, chattels, moneys and personal estate, and also real estate, if any, of

every kind and description, unto my cousin, Charles Josselyn, his executors and administrators."

The testator died on the 1st of June 1824, and his will was proved by his executors Mark Josselyn and Charles Josselyn. Mark Josselyn died on the 13th of July 1825 without having had any issue.

John Josselyn (who was the plaintiff in the cause) was eight years old at the testator's death. The property to which he became entitled under the will was of large amount; and, although the testator had directed that only £60 a year should be allowed for his board and education during his minority, yet, by an order in the cause made in November 1826, £182 was allowed for his maintenance and education from the testator's death down to June 1826, and 150 guineas per annum were allowed for his future maintenance and education: and, by two subsequent orders, one made in February 1830 and the other in July 1832, £300 per annum and £400 per annum were allowed for the like purposes.

The plaintiff attained 21 in August 1837, and, thereupon, presented a petition stating that he was advised that, *on attaining that age, he became entitled, under the will, to a vested interest in the testator's residuary estate* and the accumulations thereof, and praying that the funds of which the residue and accumulations consisted, might be transferred to him.

Mr. Spence and *Mr. Wood* appeared in support of the motion.

Mr. Knight Bruce and *Mr. Jacob* for the defendant Charles Josselyn.

Sir W. Horne for the defendant Royce, the executor of Mark Josselyn, and the only other party to the suit.

The Vice-Chancellor. [Sir Lancelot Shadwell.] The residue is actually given to the plaintiff; and the words which follow the gift are merely directory as to the future management of what is before given. I shall, therefore, make an order according to the prayer of the petition.[1]

[1] "It has frequently happened in this court, that a testator has given to an individual an absolute vested interest in a defined fund, so that, according to the ordinary rule of law, he would have a power, of his own authority, to receive or dispose of it immediately on his attaining legal age; but having given such a vested interest, the testator has, nevertheless, postponed the time of giving him possession, till a period subsequent to the legatee's attaining twenty-one, although in such cases, the party having attained the age of twenty-one cannot, according to the direct intention of the will, obtain possession, yet he has everything but possession; he has the legal power of disposing of it, he may sell, charge, or assign it, for he has an absolute, indefeasible interest in a thing defined and certain; the court, therefore, has thought fit (I don't know whether satisfactorily or not), to say, that since the legatee has such the legal right and power over the property, and can deal with it as he pleases, it will not subject him to the disadvantage of raising money by selling or charging his interest, when the thing is his own, at this very moment. The court has, in such cases, ordered payment on his attaining twenty-one." — *Per* Lord Langdale, M. R., in *Curtis* v. *Lukin*, 5 Beav. 147, 155, 156 (1842), printed in the fifth volume of these Cases, p. 785.

"The principle of this court has always been, to recognize the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the

GREET *v.* GREET.

CHANCERY. 1842.

[*Reported* 5 *Beav.* 123.]

THE testator, by his will dated in 1825, after making certain dispositions, gave the rest and residue of his property, freehold and personal, as follows: — "to the use of my nephew Thomas Young Greet at his attaining the age of thirty years, the produce of such parts of property as may be necessary to convert into cash, with every accumulation by rents, interest, or otherways, I direct to be deposited in the stock of the Bank of England, in the names of my nephew, Thomas Young Greet, and of each of my executors hereafter named, there to remain; my nephew Thomas Young Greet, at his attaining the age of thirty years, to receive, for his use, all accruing produce and dividends, rents or interest, so long as he may live; and that once in every year, the whole of the balances be funded for accumulation, until he, my said nephew Thomas Young Greet, does attain the age of thirty years, at which time every produce of the property, with dividends on the accumulated property, which I direct to be consolidated in one sum, with any other placed in the Bank of England at my death or afterwards, as a part produce of my property and to remain as a principal, the dividends of or on which, with all rents or other produce growing out of every description of my property, I give to my said nephew Thomas Young Greet, for his use and disposal during his natural life.

"If my nephew Thomas Young Greet should die previous to his attaining the age of thirty years, leaving child or children lawfully begotten, I direct each child, male or female, shall have £500, at their respectively attaining the age of twenty-four years, and the surplus of any such property and its accumulations to go, in addition, to the eldest son of my nephew Thomas Young Greet; but if the children of my said nephew are too numerous for the property to produce £500 each,

property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age: — unless, during the interval, the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one. And upon that principle, unless there is in the will, or in some codicil to it, a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment, — or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the court to hold, that, as to the previous rents and profits, there has been an intestacy — the court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years." — *Per* SIR W. PAGE WOOD, V.C., in *Gosling* v. *Gosling*, H. R. V. Johns. 265, 272 (1859).

in such case, I shall direct they shall each have an equal share of the property, male and female alike.

"If my nephew Thomas Young Greet should live, and agreeable to the directions of this my will, possess this my described residue of my property with its accumulations, and have lawfully begotten a son, I direct my nephew to enjoy the produce of such property with its accumulations during his life, and at his death, £5000 to be deposited in the hands of trustees for accumulation, and placed in the Bank of England in the name of his my nephew's eldest son with two trustees (my executors preferred if surviving), for the use of my said nephew's eldest son *at his attaining the age of thirty years*; and the rest and residue to be equally shared, male and female equal alike, the eldest son taking an equal share, in addition to the £5000 funded for him. This general division to take place as each respectively *attains the age of twenty-four years*.

"If my nephew Thomas Young Greet should die previous to his attaining the age of thirty years, leaving no child, then I direct the next surviving nephew of Alexander Greet's family shall succeed to the residue and its accumulations, subject exactly to the same regulations as described for my nephew Thomas Young Greet and his family."

The testator then appointed his nephew Thomas Young Greet and three other persons executors.

The testator died in 1829, leaving his nephew, Thomas Young Greet, then of the age of twenty-two. He married in 1832, and had four children, the eldest having been born in 1833.

Thomas Young Greet the nephew died in 1841, leaving his eldest son, Thomas Young Greet the younger, and three other children surviving him.

The property was partly real and partly personal.

Thomas Young Greet the younger, after his father's death, filed a supplemental bill against all the necessary parties, claiming to be entitled, first, to the sum of £5000; and, secondly, to his share of the general residue of the property after the deduction of that sum.

Mr. Pemberton and *Mr. Lewis*, for the plaintiff.

Mr. G. Turner and *Mr. Addis*, in the same interest.

Mr. Kindersley and *Mr. Wood*, for the next of kin and co-heirs.

Mr. Schomberg and *Mr. Hingeston*, for other parties.

THE MASTER OF THE ROLLS. [LORD LANGDALE.] This is one of the many cases in which I am afraid it is impossible to come to a conclusion which can be considered as entirely satisfactory. You are obliged to spell out the meaning of the testator, and to try to discover the legal effect of his will, under circumstances which make it extremely difficult to reconcile the case under consideration with the decided authorities.

I think it is perfectly obvious, in this case, that the testator had a strong desire to accumulate the property as much as he could, and to preserve it in the family of the Greets. Those objects clearly preponderate throughout the whole contents of the will; but the main and the

principal object in the residuary clause was, to provide for his nephew Thomas Young Greet and the children of that nephew; and there is no ulterior disposition given of the residue, except only, in the event of the nephew, Thomas Young Greet, dying under the age of thirty years without leaving a child.

At the death of the nephew, the £5000 is to be taken out of the residue, and deposited for accumulation in the hands of trustees, one of whom was to be the eldest son of the nephew. The accumulation is directed to be for the use of the nephew's eldest son, "at his attaining the age of thirty years." I think it comes to no more than this: — The testator intended that the son should attain the age of thirty years before the accumulated fund should be paid to him, and not that in the mean time he was to have no interest in this sum.

It appears to me that he had a vested interest in the sum of £5000, at the moment the severance was to be made, namely, on the death of the nephew. After taking the £5000 out of the residue, the remainder is to be shared between the children, both male and female alike, the eldest son taking an equal share, in addition to the £5000 funded for him; and as the £5000 vests upon the death of the nephew, it would be extremely difficult to maintain that his share of the residue does not vest at the same time, or to say that the share of the residue could vest in him at that time, and not in the other children.

Is the court forced to come to an opposite conclusion by the words which afterwards follow, that this general division is to take place, as each respectively attains the age of twenty-four years? The testator could never have meant, that a general division should take place at different times. His object was, that there should be a general division of the whole fund, after previously severing the particular sum of £5000; after deducting that sum, which was one division, there was to be the general division of the remainder; and, according to the intent, to be inferred from the rest of the will, I think this amounts merely to a direction, that the shares should be paid to the younger children as each attained twenty-four.

I am of opinion that both the £5000 and the share of the residue were vested interests, and the plaintiff must therefore succeed in this case.[1]

[1] See Gray, Perpetuities, §§ 120, 121.

BAGGETT *v.* MEUX.

CHANCERY. 1846.

[*Reported* 1 *Phil.* 627.]

ON the hearing of an appeal in this case from the decree of *Vice-Chancellor Knight Bruce*[1] the argument turned chiefly on the question, whether a clause in restraint of alienation, annexed to a legal devise, in fee, of real estate to a married woman for her separate use, was effectual during the coverture.

Mr. Russell and *Mr. Freeling*, for the appellant

Mr. Swanston and *Mr. Busk*, contra.

THE LORD CHANCELLOR [LORD LYNDHURST], after disposing of the other points of the case in a few words, said, with respect to this: After the case of *Tullett* v. *Armstrong*, 4 My. & Cr. 377, there can be no doubt about the doctrine of this court respecting the property given to the separate use of a married woman: and it is clear that that doctrine applies as much to an estate in fee as to a life estate. The object of the doctrine was to give a married woman the enjoyment of property independent of her husband; but to secure that object, it was absolutely necessary to restrain her during coverture from alienation. The reasoning evidently applies to a fee as much as to a life estate, to real property as much as to personal. The power of a married woman, independent of the trust for separate use, may be different in real estate from what it is in personal: but a court of equity having created in both a new species of estate, may in both cases modify the incidents of that estate.

Appeal dismissed, with costs.[2]

[1] See 1 Coll. 138, where a detailed statement of the case will be found. — REP.

[2] Cf. *Cooper* v. *Macdonald*, 7 Ch. Div. 288 (1877).

On the mode of dealing with gifts of invested personal property or of money, made directly to married women without the intervention of trustees, but with a clause against anticipation, see the cases cited, Gray, Restraints on Alienation, §§ 127–131, and also *In re Bown*, 27 Ch. Div. 411 (1884); *In re Currey*, 32 Ch. D. 361 (1886). Cf. *In re Spencer*, 30 Ch. D. 183 (1885); *In re Grey's Settlements*, 34 Ch. Div. 85, 712 (1887); *In re Tippett's Contract*, 37 Ch. Div. 444 (1888); *Re Wood*, 61 L. T. N. S. 197 (1889); 80 Law Times, 372.

OPPENHEIM *v.* HENRY.

CHANCERY. 1853.

[*Reported* 10 *Hare*, 441.]

THE principal question arose on the effect of the following bequest of the residuary estate of the testator: —

"I desire and will the remaining residue to be appropriated in manner following, — say as soon as conveniently can be after my decease, to be turned into cash, and brought into the funds, stock £3 per cent. Consols, in the names of my executors hereinafter named, and to be held by them in trust for all my grandchildren, to be divided equally among them at the end or expiration of twenty years after my decease, and the interest by the purchase of £3 per cent. Consols stock, to accumulate till that time."

Mr. Chandless and *Mr. J. H. Palmer* for the plaintiff, an infant grandchild born after the testator's decease and before the twenty years had expired, mentioned *Parker* v. *Golding*, 13 Sim. 418.

Mr. Russell and *Mr. Cole*, for the grandchildren of the testator living at his death, contended that such grandchildren only were entitled. They did not controvert the case of *Lord Bindon* v. *Earl of Suffolk*, 1 P. Wms. 96. If there had been an intervening interest, the class would not be ascertained until the termination of that interest; but here no interest intervened. The gift was directly to the grandchildren, which is construed to mean those who are alive at the death of the testator: *Horsley* v. *Chaloner*, 2 Ves. Sen. 84. In *Burrell* v. *Baskerfield*, 11 Beav. 525, *Chevaux* v. *Ainslabie*, 13 Sim. 71, *Butler* v. *Lowe*, 10 Sim. 317, a testator gave legacies to each of the children of his nephews and nieces begotten and to be begotten; and it was held, that the children of the nephews and nieces born after the testator's death did not take under the bequest: *Davison* v. *Dallas*, 14 Ves. 576, *Storrs* v. *Benbow*, 2 My. & K. 46, *Murray* v. *Tancred*, 10 Sim. 465.

Mr. Shapter, for the executors, submitted, on behalf of unborn grandchildren, that there was no gift to any grandchild to take effect until the expiration of twenty years from the death of the testator. He cited *Beck* v. *Burn*, 7 Beav. 492.

THE VICE-CHANCELLOR [SIR W. PAGE WOOD], with reference to the argument for confining the gift to grandchildren living at the expiration of the twenty years, said, that the cases which were referred to in support of the argument for postponing the gift until that time, were cases in which the gift was connected with the period of division. The strongest cases in this form were, perhaps, those in which the gift was "to children on attaining a certain age." There, no doubt, the gift

was coupled with the period of distribution. In some of those cases it might possibly have been contended, that the existence of the life interest was the only reason for postponing the division. He had no difficulty in holding, that a gift of stock in trust for all the grandchildren of the testator, to be divided equally amongst them at the period of twenty years from the time of his decease, was a vested interest in the grandchildren of the testator. The only question, then, was, in what grandchildren the gift vested; and upon this he was clearly of opinion, that the grandchildren who were living at the death of the testator, and those who were born afterwards before the period of distribution, were entitled.[1]

RE YOUNG'S SETTLEMENT.

CHANCERY. 1853.

[*Reported* 18 *Beav.* 199.]

IN 1851, C. C. Young, by his will, gave the residue of his real and personal estate, including the property comprised in his marriage settlement, to trustees, upon trust to sell and invest the produce; and, "as to two equal third parts thereof, to pay and divide the same between his two children, Mary Young and John Clark Young, share and share alike," their respective executors, administrators and assigns. He then made a substitutional gift to their respective issue, in case either died in his lifetime, which did not happen. The testator subsequently provided, that in case he should die in the minority of any one of his children, or of any issue of either of them, that his, her or their shares in the residue should not be payable till twenty-five, but should vest in him, her or them, at twenty-one, whether sons or daughters, or upon marriage. And after providing for maintenance and survivorship, he declared, that the beneficial interest thereby intended for his daughter Mary should be for her separate use, independent of any husband she might marry, "but should devolve, and be settled by deed in writing, upon her, in such manner as if she was a *feme sole* and unmarried, and her interest in the said interest, dividends and produce, should only be paid, as the same should respectively become and accrue due, and should not be anticipated by any deed or instrument whatsoever;" and that in the mean time, and until his daughter should be married, she should only be entitled to receive and take the dividends, interest, and produce of her share or shares, and retain the power to give and bequeath the capital or principal fund by her last will and testament, and which power he thereby conferred on her.

The testator died in 1852, and Mary Young attained twenty-one in 1848, and had never been married. Being desirous of obtaining the

[1] See Gray, Perpetuities, §§ 638, 639.

fund, she, by an indenture dated 26th October, 1853, assigned her one-third of the testator's residuary estate to John Clark Young, upon trust to pay, assign and transfer the same to her, or such persons as she should appoint, for her sole and separate use, &c., and after her decease, as she should by deed or will appoint, and, in default of appointment, in trust for her executors and administrators.

The trustees paid the trust funds and stock into court. A case of election arose, to which, however, it is not necessary to refer.

Mary Young and John C. Young presented this petition, praying that the fund be divided into thirds, and one of them transferred to John Clark Young for the benefit of Mary Young.

Mr. G. L. Russell, in support of the petition. There is an absolute vested interest at twenty-one, and the subsequent directions, as to the mode of enjoyment, are inoperative; 1 Roper, Leg. 527; *Josselyn* v. *Josselyn*, 9 Sim. 63; *Saunders* v. *Vautier*, 4 Beav. 115; 1 Cr. & P. 240.

Mr. Rudall, for the trustees.

The Master of the Rolls [Sir John Romilly] said, his impression was that the fund ought to be settled and remain in court, but he reserved judgment.

November 25. The Master of the Rolls. I must confess, that, on looking at this case, I have changed my opinion. I did not pay sufficient attention to the argument, that the capital is given to the lady, absolutely, in the first instance, and there is no gift over in any other part of the will; though the testator directed a settlement, it is only of the beneficial interest thereby intended for her. He afterwards gives her power to dispose of the property by will; but that was unnecessary, as she already had that power. I think the power will coalesce with her beneficial interest, and the result will be, that she takes the property absolutely. The fund may, therefore, be paid out of court.

MEBANE *v.* MEBANE.

Supreme Court of North Carolina. 1845.

[*Reported* 4 *Ired. Eq.* 131.]

Cause removed from the Court of Equity of Orange County, at the Fall Term, 1845.

The following were the facts of the case:

David Mebane, by his will, dated April 7th, 1842, gave to Alexander Mebane in fee, a tract of land, called the Hodge Place, and four slaves, "in trust for my son Anderson; and the said Alexander, as trustee, may at any time take possession of said land and negroes, and lease the land and hire the negroes, and apply the proceeds to the

maintenance of my son Anderson — it being my will and intention, that the aforesaid property shall not in any wise be subject to the debts of my said son Anderson." In a subsequent clause, the testator added: "I give unto my son Alexander, all the horses, cattle, hogs, and the farming utensils on the Hodge Place, and also one bed and furniture, in trust, nevertheless, for my said son, Anderson; it being my will and intention, that the said property shall not in any wise be subject to the debts of said Anderson. It is also my will, if the said Anderson should die without issue, that then the Hodge Place shall belong to my grandson, Thomas R. Mebane." By other clauses of the will, the testator gave to his son Anderson a share, with his other children, of the debts that might be owing to him at his death, but directed that his son Alexander, as the money might be collected, should, "as trustee, take possession of it, and pay it over in the manner directed in the former clauses of this will."

The plaintiff is a judgment creditor of Anderson Mebane; and, after a return of *nulla bona* on a *fieri facias*, he filed this bill against Anderson Mebane and Alexander Mebane, for satisfaction out of the trust property. The answers raise the question, whether the property is liable to the debts. The trustee further states, that in the maintenance of his brother Anderson, who is blind, and in necessary expenditures in conducting the farm, he has anticipated the income about $200; and he submits that at all events he has a right to be reimbursed what he shall be found to be in advance.

Badger, for the plaintiff.

Norwood and *Iredell*, for the defendants.

RUFFIN, C. J. In the case of *Dick* v. *Pitchford*, 1 Dev. & Bat. Eq. 480, the question arose upon a conveyance of negroes to one, in trust, annually to apply the profits to the use of the donor's son, H. P., so that they should not be subject to be sold or disposed of by H. P., or the rents and profits anticipated by him, or in any manner subject to his debts; and it was held, that the son's conveyance was, nevertheless, effectual to pass his interest, as *cestui que trust*, for the term of his life. The doctrine rests upon these considerations: that a gift of the legal property in a thing includes the *jus disponendi*, and that a restriction on that right, as a condition, is repugnant to the grant, and therefore void: And that, in a court of equity, a *cestui que trust* is looked on as the real owner, and the trust governed in this respect by the same rules which govern legal interests; and, consequently, that it is equally repugnant to equitable ownership that the owner should not have the power of alienating his property. There is, indeed, an exception to that general rule, which is founded on the peculiar incapacities of married women, and their subjection to their husbands. A gift in trust for the separate use of a married woman, or in contemplation of her marriage, may be coupled with a provision against alienation or anticipation; for, in truth, the restriction is imposed for her protection, and, as she is *sub potestate viri*, it will more frequently operate as a

beneficial protection, than in prejudice to her. But restraints, as conditions merely, upon alienation by a person *sui juris* have been held in a great number of cases to be null, as regards property given through the medium of a trust; and several of them are cited in *Dick* v. *Pitchford*. In the case of *Brandon* v. *Robinson*, 18 Ves. 429, for example, Lord Eldon, after speaking of the exception in respect to *feme coverts*, says: "but the case of a disposition to a man, who, if he has the property, has the power of aliening, is quite different." It is true, that property may be given in trust upon a condition, so expressed as to amount to a limitation, whereby the interest of the first taker ceases upon a particular event, and the property goes over to some other person in particular, or falls into the residue. But there is nothing like that here. By this will, the entire equitable ownership of the slaves and other personal effects, is given to the son Anderson, and of the land also, subject however, as to the last, to a contingent limitation over upon the event of Anderson's dying without leaving issue living at his death, as the will must be read since the Act of 1827. Then, there is no doubt that the donee, Anderson, has, upon the principles and precedents mentioned, the absolute right to assign his interest in these gifts, and that his assignee would have the right to take the estates under his own control.

That being so, it follows, that the interest of the *cestui que trust*, whatever it may be, is liable in this court for his debts. For it would be a shame upon any system of law, if, through the medium of a trust of any kind of contrivance, property, from which a person is absolutely entitled to a comfortable, perhaps an affluent support, and over which he can exercise the highest right of property, namely, alienation, and which, upon his death, would undoubtedly be assets, should be shielded from the creditors of that person during his life. There is no such reproach upon nor absurdity in our law; for we hold, that whatever interest a debtor has in property of any sort may be reached by his creditors, either at law or in equity, according to the nature of the property. Terms of exclusion of the donee's creditors, not amounting to a limitation of the estate, can no more repel the creditors, than a restraint upon alienation can tie the hands of the donee himself. Liability for debts ought to be, and is, just as much an incident of property, as the *jus disponendi* is; for, indeed, it is one mode of exercising the power of disposition. This is the first occasion on which the point has come directly into judgment; but in the case of *Bank of the State* v. *Forney*, 2 Ired. Eq. 184, the court said, however anxiously the benefit of the donee personally may be looked to by the donor, the policy of the law will not permit property or a trust to be so given, that the donee may continue to enjoy it after his bankruptcy, or, in other words, against his creditors. In *Brandon* v. *Robinson* there was a trust to pay dividends, from time to time, into the proper hands of a man or on his receipt, and that they should not be grantable or assignable by way of anticipation; and it was held, that this interest

passed to assignees in bankruptcy: Lord Eldon remarking, that an attempt to give property, and to prevent creditors from obtaining any interest in it, though it be his, the debtor's, could not be sustained; and that the gift must be subject to the incidents of property, and it could not be preserved from creditors, unless given to some one else, that is, limited over. Following that case, was that of *Graves* v. *Dolphin*, 1 Sim. 66, in which estates were devised in trust to pay an annuity to a son for his personal support for life, not liable to his debts, and to be paid from time to time into his own proper hands, and not to any other person, and his receipt only to be a discharge; and Sir John Leach declared, although the testator might have made the annuity determinable by the bankruptcy of his son, yet, as he had not done that, the policy of the law did not permit property to be so limited, that it should continue in the enjoyment of the donee, notwithstanding his bankruptcy; and therefore that the annuity passed under the commission. In the case of *Piercy* v. *Roberts*, 1 Mylne & Keen, 4, there was a discretion given to the trustee, but it was held not to make a difference. It was a bequest of £400 to executors, upon trust to pay the same to a son, in such smaller or larger portions, at such time or times, and in such way or manner, as they should in their judgment and discretion think best, and, upon the insolvency of the son, Sir John Leach, then Master of the Rolls, said, that the legacy could not remain in the hands of the executors, to be applied at their discretion, for the benefit of the legatee. He held that the discretion of the executors determined by the insolvency of the son, and the legacy passed by the assignment; for the insolvent being substantially entitled to the legacy, the attempt to continue in him the enjoyment of it, notwithstanding his insolvency, was in fraud of the law. In *Snowden* v. *Dales*, 6 Sim. 524, the language of the will is still stronger against any absolute right in the donee. It was an assignment of a sum of money, in trust during the life of J. D. H., or during such part thereof as the trustees should think proper, and at their will and pleasure and not otherwise, and, at such times and in such sums as they should think proper, to pay the interest to him, or, if they should think fit, to pay it in procuring for him diet, apparel and other necessaries, but so that he should not have any right or title in or to such interest, other than the trustees should, in their absolute and uncontrolled power, discretion, and inclination, think proper and expedient, and so as no creditor of his should have any lien or claim thereon, in any case; or the same be in any way liable to his debts, and disposition, or engagements — with a limitation over upon his death. The Vice-Chancellor, Sir Lancelot Shadwell, admitted it to be plain, the grantor did intend to exclude assignees in bankruptcy, and that it might have been effected, if there had been a clear gift over; but he said as there was no direction to the trustees, upon the bankruptcy of J. D. H., to withhold and accumulate the interest during his life, so as to go over with the capital upon his death, that the life interest of the bankrupt went to the assignees.

The foregoing cases sufficiently establish, that by the use of no terms or art can property be given to a man, or to another for him, so that he may continue to enjoy it, or derive any benefit from it, as the interest, or his maintenance thereout or the like, and at the same time defy his creditors and deny them satisfaction thereout. The thing is impossible. As long as the property is his, it must, as an incident, be subject to his debts, provided, only, that it be tangible. The only manner in which creditors can be excluded, is to exclude the debtor also from all benefit from, or interest in, the property, by such a limitation, upon the contingency of his bankruptcy or insolvency, as will determine his interest, and make it go to some other person. It follows, that the interests of Anderson Mebane are liable to the plaintiff's satisfaction, and that they must be sold for that purpose, unless, within a reasonable time, the plaintiff's debt should be otherwise paid. But, of course, the trustee is entitled, first, to be reimbursed out of the fund any expenditures made by him *bona fide*, and his costs in this cause; and, in order to ascertain what may be thus due, and also what may remain due on the plaintiff's judgment for principal, interest, and costs, and his costs in this court, there must be an inquiry by the master.

Per Curiam.

Decree accordingly.[1]

SANFORD *v.* LACKLAND.

UNITED STATES CIRCUIT COURT FOR THE DISTRICTS OF MISSOURI. 1871.

[*Reported* 2 *Dill.* 6.]

APPEAL from the District Court of the United States for the Eastern District of Missouri.

The plaintiff is the assignee in bankruptcy of Wm. C. Hill. The defendants are Wm. C. Hill, Lackland and Clark, the executors and trustees named in the will of James B. Hill, and Edwards, trustee in a deed of trust for the benefit of Mathews, executed by William C. Hill on the property in controversy. The question in the case is, whether, subject to the Mathews' deed of trust, the assignee in bankruptcy is entitled to the interest and right of William C. Hill in the property held by the executors or trustees named in his father's will, consisting of stocks, notes, and real estate. The essential facts are these: In 1862, James B. Hill, the father, died, leaving five children, three sons and two daughters. His will, admitted to probate in March, 1862, so far as material to the present controversy, is in these words: "All the residue of my estate, real, personal, and mixed, I give, devise, and bequeath unto Rufus J. Lackland and William G. Clark, and to the survivor of them, as trustees, in trust, however, to manage, control, and improve the said estate; to receive and collect the debts due me;

[1] See *Keyser's Appeal*, 57 Pa. 236 (1868).

to receive and collect the rents, issues, and profits of said property; to reinvest any money that may come into their hands as they may deem best or therewith improve any unimproved real estate, to rent or lease any portion of said real estate; and I do hereby invest them with full and complete authority to sell and convey in fee simple any of my real estate, and to reinvest the proceeds of such sales in other real estate, or otherwise, in their discretion, and in trust, as aforesaid, to manage, control, and keep together, my said property as one entire whole: and as I now have five children, to wit — James B. Hill, William C. Hill, Anna M. Hill, Frank W. Hill, and Mary Hill, upon the further trust, *First*, Until my children respectively arrive at the age of twenty-one years, or get married, to provide for their support, maintenance, and education out of said estate, which support, maintenance, and education is to be taken as part of the expenses of my estate; *Second*. My said trustees shall, out of my said estate, pay to each one of my children (if in their opinion such advancement shall not probably amount to more than the equitable share of such child in my estate) as they respectively arrive at the age of twenty-one years, the sum of ten thousand dollars as an advancement, and shall, from the time of such advancement, charge such child with interest thereon at the rate of six per cent per annum, if such advancement be made before the partition hereinafter mentioned; *Third*. When my eldest child shall arrive at the age of twenty-six years, or if he shall not so long live, then when the next oldest surviving child shall attain that age, my said trustees shall, with the approval of the Probate Court of St. Louis County, make a partition of all said trust estate among my said children, share and share alike, charging, however, in such division and partition, any child who may have received an advancement as before mentioned, with such advancement, with interest thereon from the time when received as part and portion of the share coming to such child, and upon such partition shall forthwith convey to such eldest child, if such eldest child be a son, the portion allotted to him in *absolute property*, but shall *hold* the shares and portions of the others of said children *until* they severally arrive at the age of twenty-six years; and as the sons severally arrive at that age they shall convey to them the share and portion allotted to such son in absolute property." [And then follows a similar provision as to the share of the estate coming to the daughters.] "After the said partition shall have been made, my said trustees shall keep the portion and share of each of my children separate (except as before), with the rents, issues, and profits belonging to such portion."

On January 29, 1870, James B., the eldest son, became twenty-six years of age, and thereupon the trustees in the will, with the approval of the Probate Court, made partition of all the property held in trust among all of the children, and there was an order of distribution in accordance with the terms of the will. The property allotted and set apart to the said William C. Hill consisted of specified stocks in certain

banks, promissory notes, and real estate, which are still in the possession and custody of the trustees. On July 6, 1870, William C. Hill executed a deed of trust on the property which had been allotted to him to Edwards, trustee for Mathews, to secure ten thousand dollars, which is yet unpaid. The trustees under the will advanced to William C. the ten thousand dollars on his becoming twenty-one years of age. On November 28, 1870, a petition for adjudication in bankruptcy was filed against him, and he was adjudged a bankrupt. The property in the hands of the trustees belonging to him is of the value of $30,760, and he is now between twenty-four and twenty-five years of age.

The bill sets out the foregoing facts, and prays that the property in the hands of the trustees allotted to William C. Hill may, subject to the encumbrance of Mathews, be decreed to belong to the assignee in bankruptcy. The District Court overruled a demurrer to the bill, and entered a decree as prayed. The trustees and the bankrupt appeal.

Cline, *Jamison*, and *Day*, for the complainant.

Slayback and *Haussler*, and *Lackland*, *Martin*, and *Lackland*, for the defendants.

DILLON, CIRCUIT JUDGE. The share of the bankrupt in his father's estate has been duly ascertained and set apart in severalty to him, but with the exception of the ten thousand dollars advanced on his attaining his majority is yet in the hands of the trustees, as he was not twenty-six years of age at the time he was adjudicated a bankrupt. By the bankrupt law, all the property of the bankrupt, with certain exemptions not necessary to be noticed, vests in the assignee (sec. 14); and if William C. Hill owned or had a beneficial interest in the property in the hands of the trustees, it passed under the bankruptcy. That he was the owner of the property which had been allotted to him under the will can scarcely admit of a doubt. The will directs a partition of the trust estate to be made among the children, and this has been done, but it also provides that the trustees shall hold the shares of the children until the sons shall severally arrive at the age of twenty-six years, when they are directed to convey to such son his portion in absolute property.

This is not the case of a legacy or gift to vest if the legatee shall arrive at a specified age which has not yet been reached. Nor is the devise or gift to the son made on any condition; there is no limitation over in case the son shall, before attaining the age of twenty-six, become a bankrupt. If William C. had not been adjudged a bankrupt, and had died intestate before reaching the age of twenty-six, can it be doubted that his heirs would have taken the estate? It has not been questioned, nor could it be, that he had the power to mortgage this property for the money borrowed of Mathews. If the intention of the testator was to prevent the property from being liable for the debts of his son, his will fails to express that intention. The testator might have provided if the son should become bankrupt before reaching twenty-six, that his estate should then determine and go somewhere

else; but he cannot give the beneficial interest and annex to it the inconsistent condition that it shall not be liable for the debts of the devisee. And in fact the father has not attempted to do this. The estate is given, and the only limitation expressed in the will is that the trustees shall *hold it* and its accumulations until he shall reach the specified age. The trustees have no beneficial interest in the estate they hold. By operation of the bankruptcy, William C. Hill has no longer any interest in it. It belongs to and is vested in the assignee for the benefit of creditors. The trustees now hold the property in trust for the benefit of these creditors, and as the strict execution of the trusts in the will have been thus rendered impossible, the court properly decreed that the property held by the trustees for the bankrupt should, subject to the Mathews encumbrance, be conveyed to the assignee in bankruptcy.

The decree of the court is affirmed. *Affirmed.*

KREKEL, J., concurs.

CLAFLIN *v.* CLAFLIN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1889.

[*Reported* 149 *Mass.* 19.]

BILL IN EQUITY, filed November 3, 1888, to terminate a trust for the benefit of the plaintiff under the will and codicil of his father, Wilbur F. Claflin, in the residue of his estate, against the trustees under the will and the plaintiff's mother and brother. The answer of the mother and brother admitted that the plaintiff had the entire beneficial interest in the principal and income of that portion of the trust fund held in trust for him, and made no claim to the same adverse to his right. Hearing before *W. Allen*, J., who ordered the bill to be dismissed; and the plaintiff appealed to the full court. The case, so far as material, is as follows:

Wilbur F. Claflin at his death left a widow and two sons, of whom the plaintiff was a minor. The will, which was dated July 27, 1885, and named William Claflin, James A. Woolson, and Horatio Newhall as executors and trustees, provided in the second clause that the sum of $50,000 might remain in the hands of one of the executors for the period of five years, the income during that time to be equally divided between the wife and the two sons, the principal at the end of that period to fall into the residue of the estate; in the sixth clause, that a trust company should hold $100,000 in trust to pay the net income of three several sums of $30,000 to the wife and sons during their lives, and to pay over the principal of such sums at their death, as they should appoint by will; in the ninth clause, that the persons named as

executors and trustees in the will should hold $60,000 to pay the net income of $20,000 to his wife for five years, and, if she should die before the end of that time, to pay over the principal as she should appoint by will, or if she should live to the end of that period, to pay it over to her, and further to pay to each son the net income of $20,000 for ten years, and, if either of them should die before the end of that time, to pay over that amount as he should appoint by will, or, if either of them should live to the end of that period, to pay it over to him; and in the eleventh clause as follows:

"Eleventh. All the rest and residue of all my personal estate I give, bequeath, and devise to William Claflin, James A. Woolson, and Horatio Newhall, all aforesaid, and to the survivors of them, but in trust nevertheless for the purposes following, viz.: to sell and dispose of the same, and to divide the proceeds equally among my wife, Mary A. Claflin, Clarence A. Claflin, my son, and Adelbert E. Claflin, my son, or their heirs by representation."

The codicil, which was dated August 6, 1885, provided that, "Whereas in item 'eleventh' in said will I directed the three trustees therein named, viz. William Claflin, James A. Woolson, and Horatio Newhall, 'to sell and dispose of the same, and to divide the proceeds equally among my wife, Mary A. Claflin, Clarence A. Claflin, my son, and Adelbert E. Claflin, my son, or their heirs by representation,' now then I revoke and annul the provision of said will as above set forth, and instead thereof I declare the trust in the words following, which words are to be taken as a part of said will instead of the words revoked and annulled, viz.: to sell and dispose of the same, and to pay to my wife, Mary A. Claflin, one third part of the proceeds thereof, and to pay to my son Clarence A. Claflin one third part of the proceeds thereof, and to pay the remaining one third part thereof to my son Adelbert E. Claflin, in the manner following, viz. ten thousand dollars when he is of the age of twenty-one years, ten thousand dollars when he is of the age of twenty-five years, and the balance when he is of the age of thirty years."

The will and codicil were duly admitted to probate, and the executors proceeded to settle the estate according to their terms; and when the plaintiff reached the age of twenty-one years the trustees paid over to him the sum of $10,000.

The plaintiff contended that he had the entire beneficial interest both in the income of the third part of the rest and residue of the estate and in the property itself, and that no reasons existed why the same should be longer held by the trustees, as such further holding caused him unnecessary inconvenience and expense.

S. N. Aldrich and *E. G. McInnes*, for the plaintiff.

H. Baldwin, for the defendants.

FIELD, J. By the eleventh article of his will as modified by a codicil, Wilbur F. Claflin gave all the residue of his personal estate to trustees, "to sell and dispose of the same, and to pay to my wife, Mary A. Claflin,

one third part of the proceeds thereof, and to pay to my son Clarence A. Claflin one third part of the proceeds thereof, and to pay the remaining one third part thereof to my son Adelbert E. Claflin, in the manner following, viz. ten thousand dollars when he is of the age of twenty-one years, ten thousand dollars when he is of the age of twenty-five years, and the balance when he is of the age of thirty years."

Apparently, Adelbert E. Claflin was not quite twenty-one years old when his father died, but he some time ago reached that age and received ten thousand dollars from the trust. He has not yet reached the age of twenty-five years, and he brings this bill to compel the trustees to pay to him the remainder of the trust fund. His contention is, in effect, that the provisions of the will postponing the payment of the money beyond the time when he is twenty-one years old are void. There is no doubt that his interest in the trust fund is vested and absolute, and that no other person has any interest in it, and the weight of authority is undisputed that the provisions postponing payment to him until some time after he reaches the age of twenty-one years would be treated as void by those courts which hold that restrictions against the alienation of absolute interests in the income of trust property are void. There has, indeed, been no decision of this question in England by the House of Lords, and but one by a Lord Chancellor, but there are several decisions to this effect by Masters of the Rolls and by Vice-Chancellors. The cases are collected in Gray's Restraints on Alienation, §§ 106–112, and Appendix II. See *Josselyn* v. *Josselyn*, 9 Sim. 63; *Saunders* v. *Vautier*, 4 Beav. 115, and, on appeal, Cr. & Ph. 240; *Rocke* v. *Rocke*, 9 Beav. 66; *In re Young's Settlement*, 18 Beav. 199; *In re Jacob's Will*, 29 Beav. 402; *Gosling* v. *Gosling*, H. R. V. Johns. 265; *Turnage* v. *Greene*, 2 Jones Eq. 63; *Battle* v. *Petway*, 5 Ired. 576.

These decisions do not proceed on the ground that it was the intention of the testator that the property should be conveyed to the beneficiary on his reaching the age of twenty-one years, because in each case it was clear that such was not his intention, but on the ground that the direction to withhold the possession of the property from the beneficiary after he reached his majority was inconsistent with the absolute rights of property given him by the will.

This court has ordered trust property to be conveyed by the trustee to the beneficiary when there was a dry trust, or when the purposes of the trust had been accomplished, or when no good reason was shown why the trust should continue, and all the persons interested in it were *sui juris* and desired that it be terminated; but we have found no expression of any opinion in our reports that provisions requiring a trustee to hold and manage the trust property until the beneficiary reached an age beyond that of twenty-one years are necessarily void if the interest of the beneficiary is vested and absolute. See *Smith* v. *Harrington*, 4 Allen, 566; *Bowditch* v. *Andrew*, 8 Allen, 339; *Russell* v. *Grinnell*, 105 Mass. 425; *Inches* v. *Hill*, 106 Mass. 575; *Sears* v.

Choate, 146 Mass. 395. This is not a dry trust, and the purposes of the trust have not been accomplished if the intention of the testator is to be carried out.

In *Sears* v. *Choate* it is said, "Where property is given to certain persons for their benefit, and in such a manner that no other person has or can have any interest in it, they are in effect the absolute owners of it, and it is reasonable and just that they should have the control and disposal of it unless some good cause appears to the contrary." In that case the plaintiff was the absolute owner of the whole property, subject to an annuity of ten thousand dollars payable to himself. The whole of the principal of the trust fund, and all of the income not expressly made payable to the plaintiff, had become vested in him when he reached the age of twenty-one years, by way of resulting trust, as property undisposed of by the will. Apparently the testator had not contemplated such a result, and had made no provision for it, and the court saw no reason why the trust should not be terminated, and the property conveyed to the plaintiff.

In *Inches* v. *Hill*, *ubi supra*, the same person had become owner of the equitable life estate and of the equitable remainder, and "no reason appearing to the contrary," the court decreed a conveyance by the trustees to the owner. See *Whall* v. *Converse*, 146 Mass. 345.

In the case at bar nothing has happened which the testator did not anticipate, and for which he has not made provision. It is plainly his will that neither the income nor any part of the principal should now be paid to the plaintiff. It is true that the plaintiff's interest is alienable by him, and can be taken by his creditors to pay his debts, but it does not follow that, because the testator has not imposed all possible restrictions, the restrictions which he has imposed should not be carried into effect.

The decision in *Broadway National Bank* v. *Adams*, 133 Mass. 170, rests upon the doctrine that a testator has a right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he sees fit, and that his intentions ought to be carried out unless they contravene some positive rule of law, or are against public policy. The rule contended for by the plaintiff in that case was founded upon the same considerations as that contended for by the plaintiff in this, and the grounds on which this court declined to follow the English rule in that case are applicable to this, and for the reasons there given we are unable to see that the directions of the testator to the trustees, to pay the money to the plaintiff when he reaches the age of twenty-five and thirty years, and not before, are against public policy, or are so far inconsistent with the rights of property given to the plaintiff that they should not be carried into effect. It cannot be said that these restrictions upon the plaintiff's possession and control of the property are altogether useless, for there is not the same danger that he will spend the property while it is in the hands of the trustees as there would be if it were in his own.

In *Sanford* v. *Lackland*, 2 Dillon, 6, a beneficiary who would have been entitled to a conveyance of trust property at the age of twenty-six became a bankrupt at the age of twenty-four, and it was held that the trustees should convey his interest immediately to his assignee, as "the strict execution of the trusts in the will have been thus rendered impossible." But whether a creditor or a grantee of the plaintiff in this case would be entitled to the immediate possession of the property, or would only take the plaintiff's title *sub modo*, need not be decided. The existing situation is one which the testator manifestly had in mind and made provision for; the strict execution of the trust has not become impossible; the restriction upon the plaintiff's possession and control is, we think, one that the testator had a right to make; other provisions for the plaintiff are contained in the will, apparently sufficient for his support, and we see no good reason why the intention of the testator should not be carried out. *Russell* v. *Grinnell*, 105 Mass. 425. See *Toner* v. *Collins*, 67 Iowa, 369; *Rhoads* v. *Rhoads*, 43 Ill. 239; *Lent* v. *Howard*, 89 M. Y. 169; *Barkley* v. *Dosser*, 15 Lea, 529; *Carmichael* v. *Thompson*, 5 Cent. Rep. 500; *Lampert* v. *Haydel*, 20 Mo. App. 616.

Decree affirmed.

B. *Estates for Life and for Years.*

BRANDON *v.* ROBINSON.

CHANCERY. 1811.

[*Reported* 1 *Rose*, 197.]

STEPHEN GOOM, by his will, bearing date the 1st of August, 1808, devised and bequeathed to the defendants, Robinson and Davies, all his real and personal estate upon trust, to sell and dispose of the same; and after payment of his debts, and some few legacies, upon trust to divide the residue of the produce of such sale, amongst his children, Thomas Goom, William Goom, Mary Wright, Esther Fuller, Elizabeth Goom, Stephen Goom, and Margaret Goom; and he directed that the eventual share and interest of his son Thomas Goom, of and in his estate and effects, should be laid out in the public funds, or on Government securities at interest, by and in the names of his trustees during his life; and that the dividends, interest, and produce thereof, as the same became payable, should be paid by them, from time to time, into his own proper hands, or on his proper order and receipt, subscribed with his own proper hand; to the intent that the same should not be grantable, transferable, or otherwise assignable, by way of anticipation of any unreceived payment or payments thereof, or of any part thereof; and that upon his decease, the principal of such

share, together with the dividends and interest, and produce thereof, should be paid and applied by his trustees, unto and amongst such person or persons, as in a course of administration would be entitled to any personal estate of his said son Thomas Goom, and as if the same had been personal estate belonging to his said son, and he had died intestate.

The testator died shortly after the date of the will.

On the 15th of June, 1811, a commission of bankrupt issued against Thomas Goom, under which the plaintiff was the surviving assignee. The bill prayed, that the will might be established; that the clear residue of the estate and effects might be ascertained; and that the plaintiff might have the benefit of such part, as in the character of assignee he should be found entitled to. To this bill there was a general demurrer, that the plaintiff had no right or title.

Mr. Hart and *Mr. Horne*, in support of the demurrer.

Mr. Leach, and *Mr. Roupell*, in support of the bill.

The Lord Chancellor. [Lord Eldon.] Without doubt a testator may limit his property, until the object of his bounty shall become bankrupt; but it is equally clear, that if he give it for life, he cannot take away the incidents to that estate. The difference is very great between giving an interest to a person while he shall remain solvent, and then over; and giving it for life. If there be a limitation over in the event of insolvency or bankruptcy, then neither the person so becoming bankrupt or insolvent, nor his assignees, can take any benefit beyond the terms of the will. In the case which arose upon Lord Foley's will, 6 Ves. 364, it was argued, and I thought admitted, that if the estate went to the sons as property in them, all the consequences must attach.

In regard to property given to the separate use of married women, the directions originally were, that the money was to be paid into their proper hands, and their receipts alone to be a discharge; it was held that a married woman might dispose of property so given to her, and that her assignee might take it, as this court would compel her to give her own receipt, in affirmance of her own contract. In *Miss Watson's Case*, the words, and not by anticipation, were introduced by Lord Thurlow: his reasoning was this; I do not hereby take away any of the incidents of property at law; this interest which a married woman is suffered to take, is a creature of equity, and equity may modify the power of alienation.

But it is quite different if the power is for life; supposing that the bankrupt makes out, that he never has an interest, till he attends personally; the act of his receipt being absolutely necessary: yet if he was never to attend, or to give that receipt, and arrears were to accumulate, it is clear that those arrears would be assets for his debts. It is not enough that the testator has said, the fund shall not be transferred; in order to prevent that, it must be given over to somebody else. Unless therefore by implication, it falls into the residue, it is an equitable interest, to which the assignees are entitled.

As to the principal fund after the death of the bankrupt, the conclusion is different; the intention of the testator is, "this is my gift, my personal estate," not that of the bankrupt's; to go as my property to certain persons whom I point out by the description of his, the bankrupt's, next of kin. This demurrer must be overruled.[1]

JACKSON *v.* HOBHOUSE.

CHANCERY. 1817.

[*Reported* 2 *Mer.* 483.]

THE defendant Mary Cox being entitled to the sum of £6000 under the will of Samuel Neate (her late husband), of which will the defendants Hobhouse, Moggridge, and Perkins were executors, by a settlement made subsequent to her marriage with the defendant George Cox, this sum was assigned to the executors, upon trust to permit the wife to receive the interest during her life to her separate use, and after her death, in case her husband should survive her, upon trust to pay the same to him during his life, and after the decease of the survivor in trust for the children of the marriage, and in case there should be no children, then for the survivor, his or her executors, &c. The settlement contained a proviso against the wife assigning or otherwise disposing of the interest of the said sum in any mode of anticipation.

Cox and his wife being afterwards desirous to raise money by way of annuity, and the defendant Leeke having agreed to purchase of them an annuity, to be secured on the £6000, provided some person to be approved of by him would join with him in covenanting for the payment, they applied to the plaintiff, who agreed to join them accordingly, and by indenture dated the 29th of July, 1813, to which the plaintiff was a party, it was witnessed that, in pursuance of such agreement, and for the considerations therein mentioned, Cox and the plaintiff covenanted with Leeke for payment to him of the annuity of £153, during the joint lives of Cox and his wife, and the life of the survivor, Mary Cox, the wife, appointing that the defendants (the trustees in the settlement) should pay and apply the yearly interest of the £6000 during her life to Leeke, upon the trusts thereinafter mentioned. And Cox and his wife thereby bargained and sold to Leeke the said yearly interest during their respective lives, and the principal sum to which the survivor would be entitled in the event of there being no issue of the marriage: upon trust, in the first place, to pay himself (Leeke) the said annuity, and subject thereto upon the trusts of the settlement.

[1] S. c. 18 Ves. 429.

Cf. *Hobbs* v. *Smith*, 15 Ohio State, 419 (1864), a case of a term for years.

Notice of this assignment was given to the executors, and the annuity was paid up to the 29th of October, 1813, only, since which time no further payments were made, and the defendant Leeke brought his action against the plaintiff upon the covenant, and recovered against him the sum of £356 for arrears of the annuity and costs.

The plaintiff by his bill representing that the proviso in the settlement against assigning by way of anticipation had been concealed from his knowledge previous to his becoming a party to the deed of assignment (he having been induced to enter into the covenant therein contained by an opinion of counsel taken upon an abstract in which no mention was made of the proviso, and the deed of assignment itself omitting to state it); moreover charging the defendant Mrs. Cox with being privy to such fraudulent misrepresentation and concealment; prayed an account of what had accrued due on the £6000 since the date of the indenture of the 29th of July, 1813, and that the defendants Cox and his wife (who were out of the jurisdiction), and the executors might be compelled to pay to the plaintiff the £356 so recovered against him in the said action, and to pay to the defendant Leeke the residue of the interest of the £6000 upon the trusts of the indenture, and an injunction to restrain the defendants (the executors) from parting with, or in any manner disposing of, the said principal sum of £6000, or the interest thereof, and from making any payment on account thereof to the defendants Cox and his wife, or to any person for their use.

The injunction was obtained upon an affidavit verifying the principal allegations in the bill, but not to the extent of charging Mrs. Cox as a party to the fraud committed; and the charge was positively and expressly denied by her answer which came in afterwards. A motion was now made, on behalf of Mrs. Cox, to dissolve the injunction.

Leach, in support of the motion.

Sir S. Romilly and *Blake*, for the plaintiff.

Sugden, for the defendant Leeke.

Abercromby, for the executors.

THE LORD CHANCELLOR. [LORD ELDON.] For many years after I entered into the profession, no such thing was known as a clause of restraint upon alienation of a wife's separate property by way of anticipation. The terms of the power in *Hulme* v. *Tenant*, 1 Bro. 16, will be remembered; and there Lord Thurlow held, that the bond being executed, the creditor was entitled to the benefit of its execution. Yet it is obvious that such a determination must defeat the intention with which the power was given. It was afterwards attempted, in cases like *Pybus* v. *Smith*, 3 Bro. 340, to be established that the alienation must be *eo modo* with the power given; that the circumstance of a direction to pay the interest from time to time into the proper hands of a married woman was enough to prevent her from having any absolute disposing power over the property, or any part, before the time of her own proper receipt of it. But this attempt also was overruled. Lord Thurlow still

continued to struggle hard that the wife might be brought into a situation consistent with the manifest intention of the settlor; but he thought the decisions too strong against it. At last, he began to alter his opinion, first, in the case of Miss Watson (see *Parkes* v. *White*, 11 Ves. 221, &c.), where he reasoned thus: — a *feme covert*, having power to alien, is a mere creature of equity to the extent to which the settlement constitutes her a *feme sole*, and no farther; and he therefore thought that the court might modify the power of alienation by such a clause as that now under consideration. Lord Alvanley, who followed, thought it a valid clause (in *Sockett* v. *Wray*, 4 Bro. 483, &c.), and so it has been considered ever since. It is too late now to contend against the validity of a clause in restraint of anticipation.

We come then to the question of fraud; and that which is alleged in the present case consists in the statement which was made for counsel's opinion, containing no notice of the clause in question, the plaintiff being alleged to have acted upon the opinion so taken. But, supposing the omission to be clearly the wife's personal fraud, the question has reference, not only to her interest, but to the intention of the author of the settlement; and it becomes a very material point to determine, whether the court will suffer the fraud of the wife to give her a power of alienation against the intention of the settlor. I am strongly inclined to think that it never could have this effect. If it were to be so held, it would tend to induce husbands to compel their wives to join in a fraud, for the purpose of giving them such a power of alienation, since the wife may then, at any time, acquire that power by virtue of her own fraudulent act. In the cases referred to, of a married woman having a power, and of an infant, they are capable by law of conveying; the act of the latter being only voidable on his attaining full age. But the present case is different, the married woman having no power to make a conveyance. If, therefore, the fact of fraud were fully established, it would be difficult to make out the inference attempted to be derived from those cases. But, in this case, the charge of fraud is not established, and the wife cannot be considered as a *feme sole* to the extent required by the plaintiff. The negligence of the plaintiff, in not requiring an inspection of the settlement, has lost him the benefit which he might have derived from knowing of its provisions. There is, therefore, not enough to support the injunction.

Injunction dissolved.

BARTON *v.* BRISCOE.

CHANCERY. 1822.

[*Reported Jac.* 603.]

By indentures dated in August 1811, made upon the occasion of the sale of certain estates belonging to James Barton, in which Marian Barton his wife joined for the purpose of relinquishing her right of dower, two sums of £14,000 and of £5833 3 per cent. Consols were paid and transferred to trustees, upon trust to lay out the same in the funds, or on real or Government securities, with the consent of Marian Barton, signified by some writing signed by her, notwithstanding her coverture, and from time to time, with her consent, during her life to vary the securities, and upon trust to pay the dividends, interest, and annual produce to such person or persons, and for such intents and purposes, as she should from time to time, notwithstanding her coverture, by any writing or writings signed by her with her name, in her own handwriting, appoint; but not so as to deprive herself of the intended use or benefit thereof by sale, mortgage, charge, or otherwise, in the way of anticipation; and for want of such direction, into her own proper hands for her own separate and peculiar use and benefit, independently and exclusively of the said James Barton, who was not to intermeddle therewith, nor was the same to be liable to his control, debts, or interference; and it was declared that her receipts for the dividends should, notwithstanding her coverture, be sufficient discharges; and after her death, upon trust to transfer the same to such person or persons, &c., as the said Marian Barton by her will or codicil signed by her, and attested by two witnesses, should appoint; and in default of such appointment, to transfer the same to Marian Millicent Barton, the only child of the said Marian Barton and her husband, for her own use and benefit.

James Barton had since died. Marian Millicent Barton had attained twenty-one. The bill was filed by her and her mother Marian Barton; stating that they had the absolute interest in the funds, and were desirous that the trusts of the indentures of August 1811 should be determined, and praying that the funds might be transferred into the sole name of Marian Barton.

Mr. Shadwell and *Mr. Pemberton*, for the plaintiffs.

Mr. Kindersley, for the trustees.

THE MASTER OF THE ROLLS. [SIR THOMAS PLUMER.] The single point in this case is, whether upon the consent of the plaintiffs, the mother and daughter, a transfer of the fund comprised in the settlement can be made, the trustees requiring the sanction of the court before paying it over to purposes not strictly according to the letter of the deed. It may be urged against it, that there are words forbidding

anticipation, directing that the mother shall not deprive herself of the use of the fund, and that she shall have during her whole life the power of disposing of it by will and not otherwise; and that to transfer it now would be directly contrary to these provisions. I have not been able to find any authority; and the question is, therefore, to be decided, whether a clause against anticipation, which is considered an obligatory and valid mode of preventing a married woman from depriving herself of the benefit of property settled (for it is too late to argue that now), becomes of no effect by the coverture being determined, and the parties interested consenting to a transfer.

In the case of a male, a similar attempt to restrain alienation would be of no effect; that was decided in *Brandon* v. *Robinson*, 18 Ves. 429, where the words were nearly the same as here. The testator directed the interest to be paid to his son for life, and that he should not have power to anticipate the growing payments; but the Lord Chancellor was of opinion, that the son taking a life interest, it followed as an incident, that he had an uncontrolled power of disposition over it, unless it was given over upon alienation, or upon an attempt to alienate. In this case there is no gift over, no other person having any interest; the equitable interest is absolute in the plaintiffs. It is not distinguishable from *Brandon* v. *Robinson*, except by the sex and coverture; and it cannot be said that the law will permit restraints upon the rights of property in the case of females which it will not permit in the case of males. It is, however, to be considered, that this is a case of separate property; and that restraints may be imposed on the alienation of separate property is now settled, more upon authority than principle, beginning with what was done by Lord Thurlow in the case of Miss Watson's settlement. At that time, however, there was considerable doubt about it; for if a *feme covert* is permitted to hold separate property in the same manner as if she were a *feme sole*, it would seem that it ought in equity to have those incidents which all other property has. It is difficult to conceive how they can be taken away from it, particularly when it is remembered, that the protection which courts of equity afford to married women with respect to their property not in settlement, they may if they please give up. Why, then, should a larger protection be extended as to that over which a power of disposition is given them? It is, however, too late to doubt the validity of these restraints: the question is, whether they must not be confined to the coverture. The power over separate property being a creature of equity, it is said that equity may modify that power; that reasoning, however, only applies during the coverture; when the married woman becomes discovert, she has the same power over her property as other persons: the restraint, therefore, ought not to continue. The attempt to impose upon the power of alienation a fetter unknown to the common law of England may be permitted to the extent to which that power is created by equity, but not further; when the coverture is gone, the reason on which the restraint is founded no longer exists.

Supposing that to be so generally, is it not pretty plain that it was in this case the intent of the parties so to confine the clause? The object was to exclude the power of the husband; her receipts are, therefore, to be discharges during the coverture: it is not to be liable to his debts; and it seems as if all the anxiety was to protect her from his control, which, by her having survived him, is now at an end.

Another point to be considered is with respect to the power the settlement gives to the mother of disposing of these funds by will. The question is, whether she can now deprive herself of it, and abdicate it. Now the case of *Smith* v. *Death*, 5 Mad. 371, and others of that kind, have decided that a power of this description may be parted with; and there is, therefore, I apprehend, nothing to prevent her from now releasing it, and thereby precluding herself from the exercise of it.[1]

GRAVES *v.* DOLPHIN.

CHANCERY. 1826.

[*Reported* 1 *Sim.* 66.]

THE testator, Benjamin Graves, gave his real and personal estates to trustees upon trust (amongst other things) to pay an annuity of £500 to his son John Graves, for the term of his natural life, and then proceeded thus: —

"And my will further is, and I do direct and declare that the said annuity, or yearly sum of £500, by me given to my son John Graves for his life as aforesaid, is by me intended for his personal maintenance and support during the whole term of his natural life, and shall not, nor shall any part thereof, on any account or pretence whatsoever, be subject or liable to the debts, engagements, charges or encumbrances of him, my said son; but that the same shall be, for the purpose aforesaid, from time to time, as and when the same shall from time to time become due and payable, be paid over into the proper hands of him, my said son, only, and not to any other person or persons whomsoever; and I do further direct that the receipt or receipts of him my said son only for such annuity shall be a good and sufficient discharge, and several good and sufficient discharges to my said trustees for the same." John Graves having become a bankrupt, his assignees sold the annuity to the defendant Freshfield: and the question in the cause

[1] In *Tullett* v. *Armstrong*, 4 Myl. & Cr. 377 (1840), LORD COTTENHAM, C., affirming the decree of Lord Langdale (1 Beav. 1), and in contradiction to his own decision, as Master of the Rolls, in *Massey* v. *Parker*, 2 Myl. & K. 174 (1834), *held* that a clause against anticipation in a gift to a *feme sole* became operative upon marriage. This has been generally followed, except in Pennsylvania. As to the law in that State, see Gray, Restraints on Alienation, § 276.

was whether the annuity passed to the assignees by the assignment of the commissioners.

Mr. Hart and *Mr. Wakefield,* for John Graves.

THE VICE-CHANCELLOR. [SIR JOHN LEACH.] The testator might, if he had thought fit, have made the annuity determinable by the bankruptcy of his son; but the policy of the law does not permit property to be so limited that it shall continue in the enjoyment of the bankrupt, notwithstanding his bankruptcy. Declare that the defendant Freshfield is well entitled to the annuity in question.

GREEN *v.* SPICER.

CHANCERY. 1830.

[*Reported* 1 *Russ. & M.* 395.]

ROBERT PINNING the elder, by his will, devised certain real estates to John Spicer and Daniel Robertson, and their heirs and assigns, "upon trust to let and manage the same, and receive the rents, issues, and profits thereof, and to pay and apply the same rents, issues, and profits to or for the board, lodging, maintenance, and support, and benefit of my son Robert Pinning at such times and in such manner as they shall think proper, for and during the term of his natural life; it being my wish that the application of the rents and profits for the benefit of my said son may be at the entire discretion of the said John Spicer and Daniel Robertson, and the survivor of them, and the heirs and assigns of such survivor, and that my said son shall not have any power to sell or mortgage, or anticipate in any way the same rents, issues, and profits, or any rents, issues, and profits, dividends or interests, derived under this my will."

Robert Pinning the younger had taken the benefit of the Act for the Relief of Insolvent Debtors; and the bill was filed by the assignee, praying that he might be declared entitled to the rents and profits of the devised hereditaments during the life of Robert Pinning the younger.

Mr. Bickersteth and *Mr. Girdlestone, Jun.,* for the plaintiff.

Mr. Agar and *Mr. Parker,* contra.

THE MASTER OF THE ROLLS. [SIR JOHN LEACH.] The question in the cause is, whether the testator's son Robert Pinning takes any estate or interest, under the will, other than by the exercise of the discretion of the trustees.

Robert Pinning takes a vested life estate of which the trustees cannot deprive him by any exercise of their discretion: they are bound to apply the rents, issues, and profits for the benefit of Robert Pinning, and their discretion applies only to the manner of the application.

Decree for the plaintiff.

SNOWDON *v.* DALES.

CHANCERY. 1834.

[*Reported* 6 *Sim.* 524.]

By a deed-poll of the 7th of December 1821, after reciting two indentures by which J. Crosby assigned two mortgage-sums of £1,000 each, to trustees upon such trusts, &c. as he should appoint: It was witnessed, and Crosby did thereby appoint that the trustees should stand possessed of those sums, in trust for himself for life, and, after his decease, in trust to pay thereout £500 and £700 to his wife's daughters, Susannah Hepworth and Anne Thompson, respectively; and, as to the remaining £800, in trust, during the life of John Doughty Hepworth, his wife's son, or during such part thereof as the trustees should think proper, and at their will and pleasure but not otherwise, or at such other time or times, and in such sum or sums, portion and portions as they should judge proper and expedient, to allow and pay the interest of the £800 into the proper hands of the said J. Doughty Hepworth, or otherwise if they should think fit, in procuring for him diet, lodging, wearing apparel and other necessaries; but so that he should not have any right, title, claim or demand in or to such interest, other than the trustees should, in their or his absolute and uncontrolled power, discretion and inclination, think proper or expedient, and so as no creditor of his should or might have any lien or claim thereon in any case, or the same be, in any way, subject or liable to his debts, disposition or engagements; and, in case he should marry and leave a widow him surviving, then, after his decease, to pay the interest to his widow during her life, for her separate use, in such manner as the trustees should judge proper: and Crosby thereby declared and appointed that a proportionate part of the interest should be paid up to the day of the decease of J. D. Hepworth and his widow; and that, from and after the decease of him or his widow, the £800 and all savings or accumulations of interest, if any, should be in trust for his children in equal shares, with benefit of survivorship on any of them dying under 21; but, if he should have no child who should attain 21, then one moiety of the £800, and all savings and accumulations of interest, if any, should be upon such trusts, &c. as Anne Thompson should appoint, and, in default of appointment, in trust for her absolutely; and that the other moiety should be in trust for Susannah Hepworth absolutely: and the trustees were empowered to apply the interest and capital of the shares of J. D. Hepworth's children, for their maintenance and advancement respectively.

Crosby died in October 1822. In April 1832 J. D. Hepworth became bankrupt. The trustees had paid or applied the interest of the £800 to him or to his use, down to the time of his bankruptcy.

The bill which was filed, by the assignees, against the bankrupt and his infant children, and against the trustees and Anne Thompson and Susannah Hepworth, prayed that the plaintiffs might be declared to be entitled to the bankrupt's life-interest in the £800, for the benefit of his creditors, and that the trustees might be decreed to pay, to the plaintiffs, the interest of the £800 become due since the bankruptcy and to accrue due during the bankrupt's life.

The defendants put in a general demurrer.

Mr. O. Anderdon, in support of the demurrer.

Mr. Bethell, in support of the bill.

The Vice-Chancellor. [Sir Lancelot Shadwell.] It is plain that the grantor did intend to exclude the assignees: and that object might have been effected if there had been a clear gift over.

But the question is whether there is anything in the deed that amounts to a direction that the trustees shall withhold the payment of the interest and accumulate it, during the lifetime of J. D. Hepworth, if they shall think fit. Although the words: "savings and accumulations," as they first occur, might bear that construction; yet, taking the whole of the instrument together, I think that the better construction is that those words do not enable the trustees to withhold and accumulate any portion of the interest during the life of J. D. Hepworth.

Declare that the plaintiffs are entitled to the bankrupt's life-interest in the £800.

LORD *v.* BUNN.

Chancery. 1843.

[*Reported* 2 *Y. & C. C. C.* 98.]

By an indenture of settlement dated the 30th March, 1822, Thomas Lord duly appointed and conveyed a freehold messuage and lands situate in the Edgeware-road to Mathew Norton and David Henderson and their heirs, upon trust for the settlor for his life, with remainder to his wife for her life, and after the decease of the survivor of them upon trust to pay or permit Thomas Lord, the son of the settlor, to receive the clear rents and profits of the premises for his life; provided always that, in case any commission of bankrupt should be issued against the said Thomas Lord the son, whereupon he should be found or declared a bankrupt, or in case he should make any composition with his creditors for the payment of his debts, though a commission of bankrupt should not issue, or should make any conveyance of his estate and effects for the benefit of his creditors, or should be discharged under any insolvent or other Act or Acts of Parliament then already or thereafter to be made or passed for the relief or benefit of insolvent debtors, then and in such case notwithstanding the trusts aforesaid they the said

trustees, their heirs or assigns, should, during the life of the said Thomas Lord the son (subject to the life estates of the said Thomas Lord the settlor and Amelia Elizabeth his wife), stand and be possessed of the said hereditaments and premises upon trust to apply, lay out, and expend the clear surplus rents, issues and profits thereof in and towards the maintenance, clothing, lodging and support of the said Thomas Lord the son, and his then present or any future wife, and his children, or any of them, or otherwise for his, her, their or any of their use and benefit, in such manner as they the said trustees, or the survivor of them, or the heirs or assigns of the survivor, should in their or his discretion think proper; and from and immediately after the decease of the survivor of them the said Thomas Lord the settlor, and Amelia Elizabeth his wife, and Thomas Lord the son, upon trust that they the said trustees, their heirs and assigns, should, during the life of the widow of the said Thomas Lord the son, if he should leave any, pay, apply and dispose of the surplus of the said rents, issues and profits unto such person or persons, and for such intents and purposes as any such widow, notwithstanding any future coverture, should from time to time (but not by way of anticipation) by any writing, as therein mentioned, under her signature appoint; and in default of such appointment, into her own proper hands for her sole and separate use; her receipts to be sufficient discharges: and from and immediately after the decease of the survivor of them, the said Thomas Lord the settlor, and Amelia Elizabeth his wife, and the said Thomas Lord the son, and his widow, if he should leave a widow, upon trust for all and every the children of the said Thomas Lord the son, who being a son or sons should live to attain the age of twenty-one years, or who being a daughter or daughters should live to attain that age or be married, which should first happen, in equal shares and proportions, if more than one, as tenants in common and not as joint tenants, and for their several and respective heirs and assigns forever; and in case there should be but one such child, then upon trust for such one or only child, his or her heirs and assigns forever.

By an indenture bearing even date with the preceding indenture, certain leasehold property situate in the New Road was duly assigned by Thomas Lord, the settlor, to the same trustees, their executors, administrators, and assigns, to hold upon trusts similar to those declared by the before-mentioned indenture, allowing for the difference of tenure of the respective properties.

Thomas Lord the settlor, and Amelia Elizabeth his wife, died many years since, leaving Thomas Lord, the son, surviving them. Thomas Lord, the son, married, and had several children.

The original trustees, under the indentures of settlement, having been discharged from their trusts, two persons, named respectively Bunn and Burgoyne, were duly appointed trustees in their room.

Some time after the Stat. 1 & 2 Vict. *c.* 110 came into operation, Thomas Lord, the son, was committed to the Queen's Bench prison,

charged in execution for debt, at the suit of one Silver. Satisfaction not having been made for the debt within twenty-one days after such committal, application in pursuance of the above-mentioned Act was made by the creditor to the Court for Relief of Insolvent Debtors for the usual vesting order, and such order was accordingly made in July, 1841. Silver was a few months afterwards appointed by the Insolvent Debtors' Court assignee of the estate and effects of the insolvent.

The trustees having, under these circumstances, refused to pay to any person the rents and profits of the property comprised in the indentures of settlement, a bill was filed in January, 1842, by the children of the insolvent, one of whom, a daughter, had attained her age of twenty-one, and the insolvent's wife, the mother of those children, against the trustees, the assignee under the Insolvent Act (Silver), and the insolvent, praying that the trusts of the indentures of settlement might be carried into execution, the rights of all parties therein ascertained, and the rents and profits secured.

By an order of the Insolvent Debtors' Court, dated the 19th May, 1842, the insolvent, having duly complied with the provisions of the 75th section of the Statute 1 & 2 Vict. *c.* 110, was discharged from custody; and the fact of such discharge was brought before this court by supplemental bill.

The cause now came on for hearing, the principal question being as to the manner in which the rents and profits of the settled property were to be disposed of during the lifetime of Thomas Lord, the son, from the time of his insolvency.

Mr. Wigram and *Mr. Craig*, for the plaintiffs.

Mr. Selwyn, for the defendants, the trustees.

Mr. Russell and *Mr. Sidebotham*, for the defendant, the assignee.

The Vice-Chancellor. [Sir J. L. Knight Bruce.] According to my construction of the instruments and the Act of Parliament, the right of those who were to take in substitution for the husband's life estate, does not arise till the actual discharge of the husband under the Insolvent Act. The rents of the property, therefore, until such discharge, formed part of the husband's estate, and belong to his assignee.

It has been admitted on the part of the assignee, and the admission must be entered by the registrar, that what was required under the Act of Parliament to be done to obtain the order of the 19th May, 1842, was done, and that thereupon Thomas Lord obtained his discharge. That being admitted, I am of opinion, that the trust from the time of the discharge took effect in favor of the husband, wife, and children, or some of them.

With regard to the question which has been agitated, whether the discretionary power created by the settlement yet remains in the trustees, I am of opinion that it does. In the first place, I think that, upon the true construction of the whole settlement together, the mean-

ing to be collected is, that a discretion was to be vested in the trustees of the settlements for the time being. It would, I think, be *hæsio in litera* if I were to hold otherwise. Assuming that these trustees were duly appointed in the room of the former trustees, I think that the discretionary power created by the settlements is vested in them. It has been suggested, that, as one of the objects who are to take in default of the execution of the power, has become an insolvent, the discretionary power is gone. I apprehend, however, that the discretionary power has not gone from the trustees. If an individual have a power over an estate, which estate, in default of execution of the power, is vested in others — as, if the person having the power be A., and the persons to take in default of execution be B. and C., it is immaterial in the consideration of A.'s right to execute the power, what may have become of the interest of B. and C., because it is a mere defeasible interest. The assignee can only take such defeasible interest as the bankrupt had. No authority has been stated to me which seems to have proceeded upon a contrary notion, and I think that the trustees have a right under the power to appoint in favor of the insolvent and his wife, or in favor of the children, or any of them, with or without the insolvent and his wife or either of them.

I am also of opinion upon these settlements (without saying what might be done under other settlements), that any benefit which the bankrupt may take will belong to his assignee.

YOUNGHUSBAND *v.* GISBORNE.

CHANCERY. 1844.

[*Reported* 1 *Coll.* 400.]

FRANCIS DUCKINFIELD, by his will, dated the 17th June, 1823, gave certain real estates to trustees, upon trust to levy and raise yearly, during the life of his brother John William Astley, one annuity or yearly sum of £400; and, in case of his death in the interval between any of the days therein mentioned for payment thereof, then a proportional part thereof up to the time of death. And he directed, that the annuity and proportional part aforesaid should be held by his said trustees, upon trust for the personal support, clothing, and maintenance of his said brother, so as not to be subject or liable to the claims of any person or persons to whom he should attempt to charge, anticipate, or otherwise encumber the same, nor to his creditors under a commission of bankruptcy or any Act for the relief of insolvent debtors, or to his own control, contracts, debts, or other engagements. And the testator declared, that the said annuity should be paid to his said

brother himself from time to time, when and after the same should become due, until he should attempt to charge, anticipate, or otherwise encumber the same, or until any other person or persons might claim the same; and from and after such attempt or claim, the same should be applied by his said trustees, or some person under their direction, for or towards the personal support, clothing, and maintenance of his said brother, and for no other purpose whatsoever.

The testator died in July, 1835, and the trustees duly paid the annuity to John William Astley up to the 25th December, 1841.

On the 31st of May, 1842, John William Astley took the benefit of the Insolvent Debtors' Act, and the plaintiffs, as his assignees, instituted this suit for the purpose of obtaining the annuity.

Mr. Wigram and *Mr. Hallett*, for the plaintiff, mentioned *Lord* v. *Bunn*, 2 Y. & C. C. C. 98.

Mr. Beales, for the insolvent, contended, that this was a mere personal trust for him; and, not being either an absolute interest or an interest for life, did not pass to the assignees. He cited *Twopeny* v. *Peyton*, 10 Sim. 487, and *Godden* v *Crowhurst*, Id. 642. [THE VICE-CHANCELLOR. If I create a trust for the maintenance and clothing of a male adult of sound mind, is it anything more than a general trust for his benefit?]

Mr. James Parker and *Mr. Colvile*, for the trustees.

In the course of the argument, the VICE-CHANCELLOR noticed, that, in *Twopeny* v. *Peyton*, the gift was to a man who, at the time of the gift, was bankrupt and insane.

THE VICE-CHANCELLOR. [SIR J. L. KNIGHT BRUCE.] I wish to be understood as not giving any opinion, whether the two cases cited by Mr. Beales are, or are not, materially distinguishable from the present. If they are not so, then I must respectfully dissent from them. In the present case, I must say that I have no doubt. There is no clause of forfeiture, no clause of cesser, no limitation over. It is merely a wordy trust for the benefit of the insolvent, attempted to be guarded from alienation, but vainly and ineffectually.

Considering the language of the will and the state of the authorities, I think it reasonable that the costs should be paid out of the fund.

IN RE COLEMAN.

CHANCERY. 1888.

[*Reported* 39 *Ch. Div.* 443.]

ALFRED COLEMAN, by will dated the 5th of August, 1875, gave his residuary estate to trustees upon trust to pay the income to his wife during widowhood, "but in the event of her death or second marriage

then I direct my said trustees to apply such rents, interest, dividends, and annual proceeds in and towards the maintenance, education, and advancement of my children in such manner as they shall deem most expedient until the youngest of my said children attains the age of twenty-one years, and on his or her attaining that age then I direct my said trustees to distribute the whole of my said estate between my said children in such shares and proportions as my said wife, if then living, shall by deed or will appoint, or if dead, then equally between all my children then living, the shares of any females to be for their sole and separate use and free from the control, debts, or engagements of any husband."

The testator died on the 17th of May, 1880, leaving a wife and four children. The widow died in May, 1884, without exercising the power of appointment. At her death two of the children, of whom John Soy Coleman was the eldest, had attained twenty-one. The other two were minors at the time of these proceedings, the youngest being in the seventh year of his age at the widow's death.

On the 13th of April, 1886, John Soy Coleman, who was resident in Australia, sold and assigned absolutely to David Henry "all and singular the part or share, and all the income, property, moneys, securities, estates, and interests to which the said J. S. Coleman was or is entitled to, or which he may at any time hereafter become entitled to under the said will of his said father, the said Alfred Coleman, deceased, or in any other manner howsoever by reason of his decease, and all stocks, funds, and securities in or upon which the same, or any part thereof, were or are, or is now, or shall or may at any time hereafter be invested, and all interest to become due in respect thereof."

From the death of the widow the trustees had applied the income in equal shares for the benefit of the four children, paying one-fourth directly to each of the two adults. In June, 1886, formal notice of the above assignment was given to the trustees, with a request by D. Henry and by J. S. Coleman that the payments might thenceforth be made to Henry. The trustees were advised not to make any further payments in respect of J. S. Coleman without the sanction of the court. They continued to apply three-fourths of the income for the benefit of the children other than J. S. Coleman, and kept the remaining fourth in hand.

In March, 1887, Henry took out an originating summons to have it decided whether the gift of capital to the children was contingent on their being alive at the period of distribution, and if so, whether J. S. Coleman had an interest in the income which would pass by his assignment.

The summons were heard before *Mr. Justice North* on the 8th of February, 1888.

Everitt, Q.C., and *Clayton*, for Henry: There is a complete trust for the benefit of a person *sui juris*, the benefit of that is capable of assignment notwithstanding that the trustees here are under the terms to apply the subject of the trust themselves: *Rippon* v. *Norton*, 2 Beav. 63; *Green* v. *Spicer*, 1 Russ. & My. 395; *Kearsley* v. *Wood-*

cock, 3 Hare, 185; *Younghusband* v. *Gisborne*, 1 Coll. 400. Here the trustees have in effect appropriated the income of three quarters to three of the children, and one quarter to J. S. Coleman; if appropriation is required to complete the title of the assignee nothing more can be necessary than what has been done.

S. Dickinson, for the infant children, was not called on.

Page, for the trustees.

North, J. I think here the trust created was a good trust, and that the assign, until the youngest child attains the age of twenty-one, is not entitled to have anything paid over to him.

I am asked, on the authority of certain cases, to deal with the question as if there had been a separate single trust for one person, but I think the cases referred to have nothing whatever to do with the present. In *Kearsley* v. *Woodcock* and *Younghusband* v. *Gisborne* there was a trust for the benefit of the persons entitled, and that being so, there was an interest which passed to the assignees. The present case seems to me entirely distinct. Here there is a gift after the death or the second marriage of the widow, in these words, "to apply such rents, dividends, interest, and annual proceeds in and towards the maintenance, education and advancement of my children in such manner as they shall deem most expedient, until the youngest of my said children attains the age of 21 years," and then there is a trust for division, when that time comes, among those who are living at that time. It seems to me there is a trust there under which the trustees may, if they like, exclude one person altogether; and they certainly have power, if they please, to apply unequal portions of the income for the maintenance of the children as they may deem necessary or desirable. There is a trust to do this in such manner as they shall deem most expedient, and "most expedient" means most for the benefit of the children for whose benefit the income is to be applied. In my opinion it is necessary to apply the rents for these children's benefit, and if the trustees think it expedient to apply more for a daughter than a son, or more for an elder child than for a younger child, it is in their discretion to do so, and in such manner as is most expedient.

There are some observations of Vice-Chancellor Shadwell in the case of *Godden* v. *Crowhurst*, 10 Sim. 642, 656, which seem to me to apply. He says: "Then the property is given for 'the maintenance and support of my said son, and any wife and child or children' (which is the event that has happened) 'he may have, and for the education of such issue or any of them, as they, my said trustees for the time being, shall, in their discretion, think fit.' Now there is nothing, in point of law, to invalidate such a gift, that I am aware of. It does not follow that anything was, of necessity, to be paid; but the property was to be applied; and there might have been a maintenance of the son, and of the wife and of the children, without their receiving any money at all. For instance, the trustees might take a house for their lodging, and they might give directions, to tradesmen, to supply the son and the

wife and the children with all that was necessary for maintenance; and, therefore, my opinion is that I am not at liberty to take this as a mere gift for the benefit of the son, simply; but it is a gift for his benefit in the shape of maintenance and support of himself jointly with his wife and children, and, if that is the true construction of the gift in question, the result is that the assignees are not entitled to anything; but the consequence is that, if the trust was a perfect trust for accumulation, for the second period, the whole of the accumulated fund will, at the end of that period, be applicable for the maintenance and support of the son, the wife and the children collectively, and the assignees have no interest at all."

Under these circumstances I am of opinion that the assign is not entitled to call upon the trustees to hand over to him the one-fourth share of the income. It is said that it has been appropriated to the share of the son. I do not so understand from the evidence. There is no dispute about the application of three-fourths of the income. That has been applied for the benefit of the persons as to whose interest there is no dispute, who have not assigned, but inasmuch as a question has been raised as to anything that may be coming to the son, who has assigned, that money has been very properly and wisely kept in hand until that dispute has been settled.

Under these circumstances it seems to me that there is a good and valid trust to apply such part of the income as the trustees may think fit for the maintenance, education, and advancement of the children (including the son in question, if they think it expedient). Then I think this further follows — if they in the exercise of that discretion appropriate a part of it to him for his benefit, and propose to apply it for his benefit by handing it over to him, I think that would be an interest which would pass by the assignment, but if, instead of doing that, they think fit to apply it in some other way for his benefit, then in my opinion the assignee does not take the benefit of that provision by way of maintenance, or whatever it is, at all.

The order as drawn up declared that no child of the testator is entitled, prior to the time when the youngest of his children attains the age of twenty-one years, to payment of, or has a transmissible interest in, one-fourth share or any part of the income of the residuary estate of the said A. Coleman, or the proceeds thereof, and that the plaintiff has no claim, present or future, prior to that event, against the trustees of the will of the said A. Coleman for income, and that the trustees are entitled to employ the income for the benefit and maintenance of the children, including the said J. S. Coleman, at their absolute discretion.

Henry appealed from this decision. The appeal was heard on the 10th of August, 1888.

Everitt, Q. C., and *Clayton*, for the appellant: We say that each child takes a vested interest in one-fourth of the income, and whatever comes in the way of property to an adult who is *sui juris* can be as-

signed. In *Rippon* v. *Norton*, 2 Beav. 63, under a very similar trust to the present, the assignee in insolvency of one of the beneficiaries was held entitled to an aliquot share.

[Cotton, L. J. That case does not help us, for no reasons are given.

Fry, L. J. I do not see my way to supporting the decision.]

In *Lord* v. *Bunn*, 2 Y. & C. (Ch.) 98, it was held that the trustees had a discretion, and they had a power of excluding any of the objects of the trust, but that so far as the insolvent took anything it would go to his assignee.

[The Court here intimated a doubt whether more was meant than that whatever interest the insolvent had if the trustees did not exercise any discretion would go to the assignee.]

In *Godden* v. *Crowhurst*, 10 Sim. 642, the power was not exclusive, but the provision was for a man and his wife and children, who were all living together, and it was held that the man's assignee in bankruptcy was not entitled to anything, but this was on the ground that the provision was not severable. In *Twopeny* v. *Peyton*, Ibid. 487, the trustees had power not to give the bankrupt anything, and on that ground his assignees could not take. In *Younghusband* v. *Gisborne*, 1 Coll. 400, a trust of income for the support, clothing, and maintenance of an adult was held to be a trust for his benefit, and to entitle his assignee in bankruptcy to the income. In this case *Godden* v. *Crowhurst* and *Twopeny* v. *Peyton* were disapproved of. There cannot be an inalienable provision for an adult *sui juris*.

[Fry, L. J. Suppose a person elected as an inmate to an almshouse with an allowance of provisions.]

That is not property coming under a deed or will. In *Green* v. *Spicer*, 1 Russ. & My. 395, where there was no power to apply otherwise than for the benefit of one person, the manner only being left discretionary, the income was held to pass to the assignee in insolvency. In Hayes's Conveyancing, 5th ed. vol. i. p. 506, it is stated that some conveyancers had thought that there could be an inalienable trust for the personal maintenance of a person *sui juris*, but the cases to which he refers show that there must be a power to give the property to some one else or it will pass to an assignee. The policy of the law is against inalienable trusts. To allow maintenance to be inalienable would be against the policy of the law: Tudor's Leading Cases on Real Property, 3d ed. p. 978.

Decimus Sturges, for the infant children: The order does not seem to be happily worded, for a transmissible interest there certainly is, though only a contingent one. The case I make is this, that the assignor has no present property under the will, his interest in the capital is contingent, and until the youngest child attains twenty-one the income is held by the trustees upon trust to apply it for the benefit of the children as they think fit, so that no child is entitled to anything but what the trustees choose to give him. This is not like the cases where there was a vested gift with a discretionary power to take it

away, still less is it like cases where there was a gift with a discretion as to the mode of its application.

[Fry, L. J. An assignment for value of whatever A. B. may take under the will of C. D., who is still living, passes whatever A. B. ultimately takes under the will of C. D. Why may not this assignment pass whatever J. S. Coleman may take under the exercise of the discretion of the trustees?]

I do not dispute that if the trustees pay him anything it would pass by the assignment, and that the payment therefore would be made to the wrong person, but I contend that the trustees might apply it for his benefit in other ways without being interfered with, *e. g.* in paying his bills. The case, I submit, is covered by authority: *Godden* v. *Crowhurst*; *Wallace* v. *Anderson*, 16 Beav. 533. The cases cited against me do not affect my position. *Lord* v. *Bunn* only decides that the assignee takes whatever the trustees determine to give to the assignor.

[Fry, L. J. Should you be satisfied with the following declarations:

1. That no child is entitled prior to the attainment of twenty-one by the youngest of the testator's children to the payment of any part of the income of the residuary estate.

2. That the trustees are entitled to apply the said income for the maintenance, education, or advancement of the children, including J. S. Coleman, in their absolute discretion.

3. That the plaintiff is entitled to no interest in the said income except such moneys or property, if any, as may be paid or delivered, or appropriated for payment or delivery by the trustees to the said J. S. Coleman.]

I should be satisfied with those declarations.

Page, for the trustees: We wish it to be decided whether we can send out goods to J. S. Coleman, and I submit that we may. Where a gift of income is for the benefit of the whole class with a discretion how it is to be applied, it has never been held that members of the class take a vested interest.

[Fry, L. J. A man may assign what he has not got, and the assignment becomes effectual if he gets it. If you send out goods to J. S. Coleman, why should not his assignee take them?]

No case goes so far as to make an assignment operate on what trustees may in their discretion allot to one of the objects of the trust: *In re Clarke*, 36 Ch. D. 348; *Official Receiver* v. *Tailby*, 18 Q. B. D. 25; 13 App. Cas. 523. The interest of J. S. Coleman in the capital is contingent: *Hilliard* v. *Fulford*, 42 L. J. (Ch.) 624; and *In re Parker*, 16 Ch. D. 44, is against vesting by reason of such a trust for maintenance as this.

Clayton, in reply. In *In re Parker* the trust was to apply the income or such part thereof as the trustees should think fit — here the trust is to apply the whole income.

Cotton, L. J. This is an appeal from an order of *Mr. Justice North*,

and we think that some alteration in its terms is requisite. The contention of the appellant was that each of the four children took a vested interest in one-fourth of the income till the youngest child attained twenty-one. I am of opinion that no child has a right to any share of the income. The trustees have a discretion to apply the income for the maintenance of the children in such manner as they think fit. This excludes the notion of the children being entitled to aliquot shares. I will assume, though I do not decide, that the trustees have no power to exclude a child, but I am clearly of opinion that under this power they could make unequal allowances for the benefit of the children, and might allow only half-a-crown to one of them. This is not a void attempt to make shares given to children inalienable, so as to exclude their creditors, it is a power to the trustees to give to each child what they think fit, and if they cannot altogether exclude a child who has become bankrupt or assigned his interest, they can allot to him as little as they think desirable. Then does the assignment include every benefit which the trustees give to J. S. Coleman out of the income? I think not. If the trustees were to pay an hotel-keeper to give him a dinner he would get nothing but the right to eat a dinner, and that is not property which could pass by assignment or bankruptcy. But if they pay or deliver money or goods to him, or appropriate money or goods to be paid or delivered to him, the money or goods would pass by the assignment. I think that the declaration proposed by Lord Justice Fry is right, and I am of opinion that the trustees will not be at liberty to send over money or goods to J. S. Coleman.

The strongest cases referred to by the counsel of the appellant were *Green* v. *Spicer* and *Younghusband* v. *Gisborne*, but in these cases the income was directed to be applied solely for the benefit of the insolvent, which made it his property, and an attempt was then made to prevent its being dealt with as his property if he became bankrupt. Here no property is given to J. S. Coleman, but only a discretion to the trustees to apply such part as they think fit of the income for his benefit. This case, therefore, does not come within the principle of those cases, and I think that the declaration proposed by the Lord Justice Fry is right.

FRY and LOPES, L.JJ., concurred.

FISHER *v.* TAYLOR.

SUPREME COURT OF PENNSYLVANIA. 1829.

[*Reported* 2 *Rawle*, 33.]

EJECTMENT in the Court of Common Pleas of Mifflin County, removed to this court by writ of error.

Matthew Taylor, by his last will and testament, dated the 16th of July, 1821, directed as follows: —

"I will and direct, that my son, John Taylor, pay out of the land devised to him six hundred and fifty dollars; and that my son, Henry Taylor, pay out of the land devised to him, thirteen hundred and fifty dollars, to, and for the following use and purpose: — My executors hereinafter mentioned shall, within one year after my decease, purchase a tract of land, at the price of two thousand dollars, four hundred dollars to be paid in hand, and the residue to be paid in four equal annual payments; and, the tract of land so purchased, shall be conveyed to my executors in trust for my son, Sample Taylor, the said Sample to have the rents, issues, and profits thereof, but the same not to be liable to any debts contracted, or which may be contracted by the said Sample, and at the death of the said Sample, the tract of land aforesaid, to vest in the heirs of the body of the said Sample, in fee; and if the said Sample shall die without heirs of his body, then the tract of land aforesaid, to vest in my right heirs."

The testator appointed his sons, John Taylor, and Henry Taylor, and his nephew, Samuel W. Taylor, his executors; and, letters testamentary were issued to them on the 20th of November, 1823. The executors, in pursuance of the said will, purchased, in the year 1824, of John Graham and wife, a tract of land, situate in Wayne township, Mifflin County, containing one hundred and eighteen acres, with a house, barn, and orchard thereon; for which a deed was made to the said executors, their heirs, and assigns, in trust, for Sample Taylor, to have the rents, issues, and profits, during life, but not subject to his debts; remainder to the heirs of his body, in fee; reversion to the heirs of Matthew Taylor.

The plaintiff in error, who was plaintiff below, had a judgment in the Court of Common Pleas of Mifflin County of August Term, 1825, on which a *fieri facias* was issued, and levied, by his directions, on the life estate of the defendant, Sample Taylor, in this tract of land. By virtue of a *venditioni exponas*, to November Term, 1825, the estate thus levied upon, was sold by the sheriff of Mifflin County to the plaintiff, and a deed for the same was duly executed and acknowledged. The plaintiff thereupon brought an ejectment against the defendant, to recover the estate sold and conveyed to him. In this action, Henry

Taylor, John Taylor, and Samuel W. Taylor, executors of Matthew Taylor, deceased, came into court, and prayed to be admitted, and were admitted, as co-defendants.

On the trial of the cause, the Court charged the jury as follows: —

BURNSIDE, PRESIDENT. The plaintiff's counsel contend, that Sample Taylor had a life estate in the premises, which could be sold and conveyed by the sheriff, and he let into possession to take the rents and profits of the estate during the life of Sample Taylor, and insists, 1. That a judgment is a lien on every possible interest which a debtor has in land. 2. That a lease is subject to a judgment. 3. That a trust estate is liable for debts, and that this devise is within the Statute of Uses, and is subject to all the incidents of any other estate for life. 4. That the limitation is inconsistent with the estate granted, and that it is subject to the debts of Sample Taylor. These among others embrace the arguments of the plaintiff; and, however generally correct his propositions are, this court deny their application to the case before us. Matthew Taylor had a right to devise his estate to whom, and in what manner he pleased. He had a right to make a provision for his son, and such a provision as would not be subject to the claim of creditors; and, in the opinion of the court, by his will he has done so. The executors take the estate upon the special trust, to let Sample have the rents, issues, and profits for his life. They have a right to the occupation of the estate, to rent it, to have it farmed and worked, and to pay over the rents, issues, and profits to Sample — they may permit him to use it. This is not a use executed by the Statute. Trust estates have been recognized by our own legislature; they are excepted out of the Statute respecting joint tenancy. Trusts are often created for the best purposes: for the support of infants, the protection of females, and the maintenance of the unfortunate. This court deny the right of the plaintiff to recover; and, they instruct you, that the sheriff's sale did not devest the executors of Matthew Taylor of their legal right to use and occupy this estate, and to pay over the rents, issues, and profits, to Sample Taylor, and that the defendants are entitled by law to your verdict.

The jury accordingly found for the defendants, and the court thereupon entered judgment. To reverse that judgment, the plaintiff sued out the present writ of error.

The errors assigned were: —

"1. The Court erred in charging the jury, that the estate of Sample Taylor, was not executed by the Statute of Uses.

"2. The Court erred in saying, that it was not subject to the claim of creditors.

"3. The Court erred in charging, that the executors of Matthew Taylor had a right to the occupation of the estate, to rent it, to have it farmed and worked, and pay over the rents and profits to Sample Taylor.

"4. The Court erred in saying, that the executors of Matthew Tay-

lor had the legal right to use and occupy the estate, and that the sheriff's sale did not devest them of it.

"5. The Court erred in denying the right of the plaintiff to recover."

The cause was argued in this court by *W. M. Hall* and *Blythe*, for the plaintiff in error.

Banks and *Potter*, for the defendants in error.

SMITH, J. The only question before the court below was, and it is the only question here, whether Sample Taylor had such an interest in the land mentioned in this ejectment, under the above-mentioned will and deed, as is by law subject to the lien of a judgment, and such as may be sold by execution against him for the payment of his debts? There never has been a question, or doubt, as to the intention of the testator. He manifestly designed to secure to his son, Sample Taylor, the enjoyment of the rents, issues, and profits of the land, during his life, in such a manner, that they should not be subject to be sold for the payment of his debts; and, he constituted his executors special trustees, to carry that intention into effect. The Court of Common Pleas correctly decided, that this was not a case within the Statute of Uses. It was necessary that the executors should take the legal estate for the purposes of the trust, in order to give effect to the testator's intention; and, they were, therefore, properly held to be entitled to use and occupy the land, to let it, or to have it tilled and worked, so as to enable them to comply with the disposition of the testator, in regard to the application of the rents, issues, and profits to Sample Taylor. A different construction would make the beneficial interest, which the testator intended to provide for his son, subject to be sold for his debts, when he expressly declared, that it should not be so subject, and would thus set up a new will in place of that which it affected to interpret.

The intention of the testator ascertained, the only question is, whether his disposition is contrary to law. A man may, undoubtedly, so dispose of his land as to secure to the object of his bounty, and to him exclusively, the annual profits. The mode in which he accomplishes such a purpose, is by creating a trust estate, explicitly designating the uses, and defining the powers of the trustees. All this, we think, has been sufficiently effected in the case under consideration. Nor is such a provision contrary to the policy of the law, or to any Act of Assembly. Creditors cannot complain, because they are bound to know the foundation upon which they extend their credit. The Act of Assembly, cited from 1 Smith's Laws, 7, does not apply, the land in question not being the land of Sample Taylor, the defendant. He has no life estate in it, nor any interest which is subject to be sold for the payment of his debts. The benefit he derives under the will of his father, is merely the right of receiving from the trustees, the rents and profits of the premises, which they hold under the deed from John Graham and wife; to the perception of those rents and profits, they are in the first place entitled, for the purpose of fulfilling their trust.

We are of opinion, that the judgment of the Court of Common Pleas, was correct, and ought to be affirmed.

TOD, J., dissented.

Judgment affirmed.[1]

TILLINGHAST *v.* BRADFORD.

SUPREME COURT OF RHODE ISLAND. 1858.

[*Reported* 5 *R. I.* 205.]

DEMURRER to a bill in equity, filed by the plaintiff as assignee, under the "Poor Debtor's Act," of Hezekiah Sabin the younger, against him, and against Nicholas H. Bradford, trustee under the will of Hezekiah Sabin, Sen., of certain real estate situated in Westminster Street in Providence, held by said Bradford in trust for the benefit of said Hezekiah the younger.

The bill, in substance, set forth the will of Hezekiah Sabin, Sen., of the date of February 6, 1853, and his subsequent death; and it appeared, that in and by said will, the testator devised a certain undivided share of the real estate in question to Charles F. Tillinghast, Esq. — whose successor in the trust Bradford was stated to be, — "*In trust*, to hold the same, for the said trustee to receive the rents and profits thereof, and after paying therefrom all the taxes, repairs, insurance, and other charges thereon, to pay to my said son Hezekiah the net income thereof during his natural life, for his own use, and from and after his decease to convey the said portion of said real estate according to the provisions of the last will and testament of the said Hezekiah Sabin, Jr., and in default of such will, to his heirs at law;" and that after creating other trusts, in like terms, of his property, real and personal, to be administered by the same trustee for the benefit of his children, male and female, including said Hezekiah, Jr., the testator, in the 10th clause of his will, declared as follows: "Section 10th, I hereby declare it to be my will, that the payment of the rents, income, interest, or dividends, to be made by the trustee to my children in pursuance of the provisions of my will, shall be made to them from time to time, as the said rents, income, interest, or dividends accrue or may be received, and not in the way of anticipation, nor to their assigns, and that such payments shall be for their sole and separate use." The bill further

[1] "The fact that the conveyance was made to assume the form of a trust, and for the special purpose of keeping John's creditors at bay, makes nothing against its validity, so far as the latter are concerned, for neither policy nor equity prohibits a parent to make such provision for the maintenance and comfort of an insolvent child. On the contrary, these trusts are favored and sustained by the law, as suggested by the best feelings of our nature, and doing harm to no one." — *Per* BELL, J., in *Eyrick* v. *Hetrick*, 13 Pa. 488 (1850).

set forth, that whilst said Hezekiah Sabin, Jr., was entitled as aforesaid under the will of his father — being in danger of being committed to jail in a certain execution for rent, then out against him — he cited his creditors to appear to show cause why he should not take the poor debtor's oath; and, as the condition upon which he was entitled to be admitted to take the same, on the 24th day of November, 1856, executed to the plaintiff in fee an assignment of "all my (his) estate, both real and personal, not exempt from attachment by law; to have and to hold the same in trust for the benefit of all my creditors in proportion to their respective demands."

The bill prayed, that Bradford might be decreed to pay the rents and profits of the trust property, as the same might accrue, to the plaintiff, for the benefit of the creditors of Hezekiah Sabin the younger, and that the plaintiff might be decreed to be entitled to receive the same for such purpose; that Bradford might be enjoined from paying over such rents and profits to Hezekiah Sabin the younger, or to others, and for further relief.

Currey, in support of the demurrer.

Tillinghast and *Bradley*, for the plaintiff.

AMES, C. J. The demurrer to this bill is attempted to be supported, substantially, upon two grounds: *First*, that Hezekiah Sabin, Jr., had not such an equitable interest, under his father's will, in the trust property in question, that he could alienе the same to the plaintiff in trust for his creditors; and, *second*, that in legal intendment he did not, by the assignment executed by him under the Poor Debtor's Act, aliene the same to the plaintiff, upon such trust.

The nature of the debtor's interest in the trust property, under his father's will, was an equitable estate for life, with a power of disposing of the remainder in fee by will; in default of such disposition, such remainder to be conveyed to his heirs at law; there being also a clause in the will against anticipation and alienation of the rents and profits during the debtor's life. It is quite clear, that it was the intention of the testator to make an alimentary provision for his son during life, which should give him all the advantages of an estate in fee, without the legal incidents of such an estate, — alienability, unless by will, and subjectiveness to the payment of the son's debts. Such restraints, however, are so opposed to the nature of property, — and, so far as subjectiveness to debts is concerned, to the honest policy of the law, — as to be totally void, unless, indeed, which is not the case here, in the event of its being attempted to be alienеd, or seized for debts, it is given over by the testator to some one else. This has been the settled doctrine of a court of chancery, at least since *Brandon* v. *Robinson*, 18 Ves. 429; and in application to such a case as this, is so honest and just, that we would not change it if we could. Certainly, no man *should* have an estate to live on, but not an estate to pay his debts with. Certainly, property available for the purposes of pleasure or profit, should be also amenable to the demands of justice.

The other ground of demurrer taken, is equally without support. The difference between the prescribed terms of the assignment of an insolvent and a poor debtor, remarked upon by the counsel for the respondent, is verbal merely: the words "all my estate, both real and personal, not exempt from attachment by law," prescribed for the latter as descriptive of the subject of conveyance, being quite ample enough to include every equitable as well as legal interest in the real or personal property of the assigning debtor. The property excepted from the assignment by the words "exempt from attachment," is clearly that expressly exempted from attachment by our Statute relating to that subject. It can hardly be supposed that the General Assembly intended that a man should be admitted to the poor debtor's oath, whilst rolling in the wealth of a trust estate, applicable by law to the payment of his debts.

It has been suggested, that if the points taken on demurrer be decided against the respondents, they will decline to answer over, and will submit to the decree asked; and we are requested, under such circumstances, by the respondent, Bradford, to allow him his costs and necessary expenses of defence out of the trust fund. As this is the first time that this question has come before the court, and the trustee has taken the speediest mode of bringing the question of his duty, under the circumstances, to a decision, we think it but reasonable, that submitting now to the decree asked by the plaintiff, he should be made whole out of the trust fund for his costs, and for necessary expenses in endeavoring to keep it applied according to the will of his testator.

Demurrer overruled.

NICHOLS *v.* EATON.

SUPREME COURT OF THE UNITED STATES. 1875.

[*Reported* 91 *U. S.* 716.]

APPEAL from the Circuit Court of the United States for the District of Rhode Island.

The controversy in this case arises on the construction and legal effect of certain clauses in the will of Mrs. Sarah B. Eaton. At the time of her death, and at the date of her will, she had three sons and a daughter; being herself a widow, and possessed of large means of her own. By her will, she devised her estate, real and personal, to three trustees, upon trusts to pay the rents, profits, dividends, interest, and income of the trust-property to her four children equally, for and during their natural lives, and, after their decease, in trust for such of their children as shall attain the age of twenty-one, or shall die under that age having lawful issue living; subject to the condition, that if any of her children should die without leaving any child who should

survive the testatrix and attain the age of twenty-one years, or die under that age leaving lawful issue living at his or her decease, then, as to the share or respective shares, as well original as accruing, of such child or children respectively, upon the trusts declared in said will concerning the other share or respective shares. The will also contained a provision, that if her said sons respectively should alienate or dispose of the income to which they were entitled under the trusts of the will, or if, by reason of bankruptcy or insolvency, or any other means whatsoever, said income could no longer be personally enjoyed by them respectively, but the same would become vested in or payable to some other person, then the trust expressed in said will concerning so much thereof as would so vest should immediately cease and determine. In that case, during the residue of the life of such son, that part of the income of the trust-fund was to be paid to the wife and children, or wife or child, as the case might be, of such son; and, in default of any objects of the last-mentioned trust, the income was to accumulate in augmentation of the principal fund.

There is another proviso, which, as it is the main ground of the present litigation, is here given *verbatim*, as follows: —

"Provided also, that in case at any future period circumstances should exist, which, in the opinion of my said trustees, shall justify or render expedient the placing at the disposal of my said children respectively any portion of my said real and personal estate, then it shall be lawful for my said trustees, in their discretion, but without its being in any manner obligatory upon them, to transfer absolutely to my said children respectively, for his or her own proper use and benefit, any portion not exceeding one-half of the trust-fund from whence his or her share of the income under the preceding trusts shall arise; and, immediately upon such transfer being made, the trusts hereinbefore declared concerning so much of the trust-fund as shall be so transferred shall absolutely cease and determine; and in case after the cessation of said income as to my said sons respectively, otherwise than by death, as hereinbefore provided for, it shall be lawful for my said trustees, in their discretion, but without its being obligatory upon them, to pay to or apply for the use of my said sons respectively, or for the use of such of my said sons and his wife and family, so much and such part of the income to which my said sons respectively would have been entitled under the preceding trusts in case the forfeiture hereinbefore provided for had not happened."

The daughter died soon after the mother, without issue, and unmarried. Amasa M. Eaton, one of the sons of the testatrix, failed in business, and made a general assignment of all his property to Charles A. Nichols for the benefit of his creditors, in March, 1867; and in December, 1868, was, on his own petition, declared a bankrupt, and said Nichols was duly appointed his assignee in bankruptcy. Said Amasa was then, and during the pendency of this suit, unmarried, and without children. He, William M. Bailey, and George B. Ruggles (a son of

testatrix by a former husband), were the executors and trustees of the will.

It will be seen at once, that whether regard be had to the assignment before bankruptcy, or to the effect of the adjudication of bankruptcy, and the appointment of Nichols as assignee in that proceeding, one of the conditions had occurred on which the will of Mrs. Eaton had declared that the devise of a part of the income of the trust estates to Amasa M. Eaton should cease and determine; and, as he had no wife or children in whom it could vest, it became, by the alternative provision of the will, a fund to accumulate until his death, or until he should have a wife or child who could take under the trust.

But Nichols, the assignee, construing the whole of the will together, and especially the proviso above given *verbatim*, to disclose a purpose, under cover of a discretionary power, to secure to her son the right to receive to his own use the share of the income to which he was entitled before the bankruptcy, in the same manner afterwards as if that event had not occurred, brought this bill against the said executors and trustees to subject that income to administration by him as assignee in bankruptcy for the benefit of the creditors.

Upon a final hearing the Circuit Court dismissed the bill, and Nichols appealed to this court.

Mr. Horatio Rogers and *Mr. C. S. Bradley*, for the appellant.

Mr. Abraham Payne and *Mr. Samuel Currey*, for the appellees.

Mr. Justice Miller, after stating the case, delivered the opinion of the court.

The claim of the assignee is founded on the proposition, ably presented here by counsel, that a will which expresses a purpose to vest in a devisee either personal property, or the income of personal or real property, and secure to him its enjoyment free from liability for his debts, is void on grounds of public policy, as being in fraud of the rights of creditors; or as expressed by Lord Eldon in *Brandon* v. *Robinson*, 18 Ves. 433, "If property is given to a man for his life, the donor cannot take away the incidents of a life-estate."

There are two propositions to be considered as arising on the face of this will, as applicable to the facts stated: 1. Does the true construction of the will bring it within that class of cases, the provisions of which on this point are void under the principle above stated? and 2. If so, is that principle to be the guide of a court of the United States sitting in chancery?

Taking for our guide the cases decided in the English courts, the doctrine of the case of *Brandon* v. *Robinson* seems to be pretty well established. It is equally well settled that a devise of the income of property, to cease on the insolvency or bankruptcy of the devisee, is good, and that the limitation is valid. *Demmill* v. *Bedford*, 3 Ves. 149; *Brandon* v. *Robinson*, 18 Id. 429; *Rochford* v. *Hackman*, 9 Hare; Lewin on Trusts, 80, ch. vii., sect. 2; *Tillinghast* v. *Bradford*, 5 R. I. 205.

If there had been no further provision in regard to the matter in this will than that on the bankruptcy or insolvency of the devisee, the trust as to him should cease and determine; or if there had been a simple provision, that, in such event, that part of the income of the estate should go to some specified person other than the bankrupt, there would be no difficulty in the case. But the first trust declared after the bankruptcy for this part of the income is in favor of the wife, child, or children of such bankrupt, and in such manner as said trustees in their discretion shall think proper. If the bankrupt devisee had a wife or child living to take under this branch of the will, there does not seem to be any doubt that there would be nothing left which could go to his assignee in bankruptcy. The cases on this point are well considered in Lewin on Trusts, above cited; and the doctrine may be stated, that a direction that the trust to the first taker shall cease on his bankruptcy, and shall then go to his wife or children, is valid, and the entire interest passes to them; but that if the devise be to *him* and his wife or children, or if he is in any way to receive a vested interest, that interest, whatever it may be, may be separated from those of his wife or children, and be paid over to his assignee. *Page* v. *Way*, 3 Beav. 20; *Perry* v. *Roberts*, 1 Myl. & K. 4; *Rippon* v. *Norton*, 2 Beav. 63; *Lord* v. *Bunn*, 2 You. & Coll. Ch. 98. Where, however, the devise over is for the support of the bankrupt and his family, in such manner as the trustees may think proper, the weight of authority in England seems to be against the proposition that anything is left to which the assignee can assert a valid claim. *Twopeny* v. *Peyton*, 10 Sim. 487; *Godden* v. *Crowhurst*, Id. 642.

In the case before us, the trustees are authorized, in the event of the bankruptcy of one of the sons of testatrix without wife or children (which is the condition of the trust as to Amasa M. Eaton), to loan and reinvest that portion of the income of the estate in augmentation of the principal sum or capital of the estate until his decease, or until he shall have wife or children capable of receiving the trust of the testatrix forfeited by him.

There does not seem, thus far, any intention to secure or revest in the bankrupt any interest in the devise which he had forfeited; and there can be no doubt, that, but for the subsequent clauses of the will, there would be nothing in which the assignee could claim an interest. But there are the provisions, that the trustees may, at their discretion, transfer at any time to either of the devisees the half or any less proportion of the share of the fund itself which said devisee would be entitled to if the whole fund were to be equally distributed; and the further provision, that, after the cesser of income provided for in case of bankruptcy or other cause, it shall be lawful, but not obligatory on her said trustees, to pay to said bankrupt or insolvent son, or to apply for the use of his family, such and so much of said income as said son would have been entitled to in case the forfeiture had not happened.

It is strongly argued that these provisions are designed to evade the

policy of the law already mentioned; that the discretion vested in the trustees is equivalent to a direction, and that it was well known it would be exercised in favor of the bankrupt.

The two cases of *Twopeny* v. *Peyton* and *Godden* v. *Crowhurst*, above cited from 10 Sim., seem to be in conflict with this doctrine; while the cases cited in appellant's brief go no farther than to hold, that when there is a right to support or maintenance in the bankrupt, or the bankrupt and his family, a right which he could enforce, then such interest, if it can be ascertained, goes to the assignee.

No case is cited, none is known to us, which goes so far as to hold that an absolute discretion in the trustee — a discretion which, by the express language of the will, he is under no obligation to exercise in favor of the bankrupt — confers such an interest on the latter, that he or his assignee in bankruptcy can successfully assert it in a court of equity or any other court.

As a proposition, then, unsupported by any adjudged case, it does not commend itself to our judgment on principle. Conceding to its fullest extent the doctrine of the English courts, their decisions are all founded on the proposition, that there is somewhere in the instrument which creates the trust a substantial right, a right which the appropriate court would enforce, left in the bankrupt after his insolvency, and after the cesser of the original and more absolute interest conferred by the earlier clauses of the will. This constitutes the dividing-line in the cases which are apparently in conflict. Applying this test to the will before us, it falls short, in our opinion, of conferring any such right on the bankrupt. Neither of the clauses of the provisos contain anything more than a grant to the trustees of the purest discretion to exercise their power in favor of testatrix's sons. It would be a sufficient answer to any attempt on the part of the son in any court to enforce the exercise of that discretion in his favor, that the testatrix has in express terms said that such exercise of this discretion is not "in any manner obligatory upon them,"— words repeated in both these clauses. To compel them to pay any of this income to a son after bankruptcy, or to his assignee, is to make a will for the testatrix which she never made; and to do it by a decree of a court is to substitute the discretion of the chancellor for the discretion of the trustees, in whom alone she reposed it. When trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of a discretion vested in them by the instrument under which they act. Hill on Trustees, 486; Lewin on Trusts, 538; *Boss* v. *Goodsall*, 1 Younge & Collier, 617; *Maddison* v. *Andrew*, 1 Ves. Sr. 60. And certainly they would not do so in violation of the wishes of the testator.

But, while we have thus attempted to show that Mrs. Eaton's will is valid in all its parts upon the extremest doctrine of the English Chancery Court, we do not wish to have it understood that we accept the limitations which that court has placed upon the power of testamentary disposition of property by its owner. We do not see, as implied in the

remark of Lord Eldon, that the power of alienation is a *necessary* incident to a life-estate in real property, or that the rents and profits of real property and the interest and dividends of personal property may not be enjoyed by an individual without liability for his debts being attached as a necessary incident to such enjoyment. This doctrine is one which the English Chancery Court has engrafted upon the common law for the benefit of creditors, and is comparatively of modern origin. We concede that there are limitations which public policy or general Statutes impose upon all dispositions of property, such as those designed to prevent perpetuities and accumulations of real estate in corporations and ecclesiastical bodies. We also admit that there is a just and sound policy peculiarly appropriate to the jurisdiction of courts of equity to protect creditors against frauds upon their rights, whether they be actual or constructive frauds. But the doctrine, that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court.

If the doctrine is to be sustained at all, it must rest exclusively on the rights of creditors. Whatever may be the extent of those rights in England, the policy of the States of this Union, as expressed both by their Statutes and the decisions of their courts, has not been carried so far in that direction.

It is believed that every State in the Union has passed Statutes by which a part of the property of the debtor is exempt from seizure on execution or other process of the courts; in short, is not by law liable to the payment of his debts. This exemption varies in its extent and nature in the different States. In some it extends only to the merest implements of household necessity; in others it includes the library of the professional man, however extensive, and the tools of the mechanic; and in many it embraces the homestead in which the family resides. This has come to be considered in this country as a wise, as it certainly may be called a settled, policy in all the States. To property so exempted the creditor has no right to look, and does not look, as a means of payment when his debt is created; and while this court has steadily held, under the constitutional provision against impairing the obligations of contracts by State laws, that such exemption laws, when first enacted, were invalid as to debts then in existence, it has always held, that, as to contracts made thereafter, the exemptions were valid.

This distinction is well founded in the sound and unanswerable reason, that the creditor is neither defrauded nor injured by the application of the law to his case, as he knows, when he parts with the consideration of his debt, that the property so exempt can never be made liable to its payment. Nothing is withdrawn from this liability which was ever subject to it, or to which he had a right to look for its

discharge in payment. The analogy of this principle to the devise of the income from real and personal property for life seems perfect. In this country, all wills or other instruments creating such trust-estates are recorded in public offices, where they may be inspected by every one; and the law in such cases imputes notice to all persons concerned of all the facts which they might know by the inspection. When, therefore, it appears by the record of a will that the devisee holds this life-estate or income, dividends, or rents of real or personal property, payable to him alone, to the exclusion of the alienee or creditor, the latter knows, that, in creating a debt with such person, he has no right to look to that income as a means of discharging it. He is neither misled nor defrauded when the object of the testator is carried out by excluding him from any benefit of such a devise.

Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who *gives*, who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived.

These views are well supported by adjudged cases in the State courts of the highest character.

In the case of *Fisher* v. *Taylor*, 2 Rawle, 33, a testator had directed his executors to purchase a tract of land, and take the title in their name in trust for his son, who was to have the rents, issues, and profits of it during his life, free from liability for any debts then or thereafter contracted by him. The Supreme Court of Pennsylvania held that this life-estate was not liable to execution for the debts of the son. "A man," says the court, "may undoubtedly dispose of his land so as to secure to the object of his bounty, and to him exclusively, the annual profits. The mode in which he accomplishes such a purpose is by creating a trust estate, explicitly designating the uses and defining the powers of the trustees. . . . Nor is such a provision contrary to the policy of the law or to any Act of Assembly. Creditors cannot complain, because they are bound to know the foundation on which they extend their credit."

In the subsequent case of *Holdship* v. *Patterson*, 7 Watts, 547, where the friends of a man made contributions by a written agreement to the support of himself and family, the court held that the instalments which they had promised to pay could not be diverted by his creditors to the payment of his debts; and Gibson, C. J., remarks, that "the fruit of their bounty could not have been turned from its object by the defendant's creditors, had it been applicable by the terms of the trust to his personal maintenance; for a benefactor may certainly

provide for the maintenance of a friend, without exposing his bounty to the debts or imprudence of the beneficiary."

In the same court, as late as 1864, it was held that a devise to a son of the rents and profits of an estate during his natural life, without being subject to his debts and liabilities, is a valid trust; and, the estate being vested in trustees, the son could not alienate. *Shankland's Appeal*, 47 Penn. St. 113.

The same proposition is either expressly or impliedly asserted by that court in the cases of *Ashhurst* v. *Given*, 5 W. & S. 323; *Brown* v. *Williamson*, 36 Penn. St. 338; *Still* v. *Spear*, 45 Id. 168.

In the case of *Leavitt* v. *Bierne*, 21 Conn., Waite J., in delivering the opinion of the court, says, "We think it in the power of a parent to place property in the hands of trustees for the benefit of a son and his wife and children, with full power in them to manage and apply it at their discretion, without any power in the son to interfere in that management, or in the disposition of it until it has actually been paid over to him by the trustees;" and he proceeds to argue in favor of the existence of this power, from the vicious habits or intemperate character of the son, and the right of the father to provide against these misfortunes.

In the case of *Nickell et al.* v. *Handly et al.*, 10 Gratt. 336, the court thus expresses its view on the general question, though not, perhaps, strictly necessary to the judgment in that case: "There is nothing in the nature or law of property which would prevent the testatrix, when about to die, from appropriating her property to the support of her poor and helpless relatives, according to the different conditions and wants of such relatives; nothing to prevent her from charging her property with the expense of food, raiment, and shelter for such relatives. There is nothing in law or reason which should prevent her from appointing an agent or trustee to administer her bounty."

In the case of *Pope's Executors* v. *Elliott & Co.*, 8 Ben. Monr. 56, the testator had directed his executors to pay for the support of Robert Pope the sum of $25 per month. Robert Pope having been in the Rocky Mountains until the sum of $225 of these monthly payments had accumulated in the hands of the executors, his creditors filed a bill in chancery, accompanied by an attachment, to subject this fund to the payment of their debt.

The Court of Appeals of Kentucky say that it was the manifest intent of the testator to secure to Robert the means of support during his life to the extent of $25 per month, or $300 per year; and that this intent cannot be thwarted, either by Robert himself by assignment or alienation, or by his creditors seizing it for his debts, unless the provision is contrary to law or public policy. After an examination of the Statutes of Kentucky and the general principles of equity jurisprudence on this subject, they hold that neither of these are invaded by the provision of the will.

The last case we shall refer to specially is that of *Campbell* v. *Foster*, 35 N. Y. Court of Appeals, 361.

In that case it is held, after elaborate consideration, that the interest of a beneficiary in a trust-fund, created by a person other than the debtor, cannot be reached by a creditor's bill; and, while the argument is largely based upon the special provision of the Statute regulating the jurisdiction of the court in that class of cases, the result is placed with equal force of argument on the general doctrines of the Court of Chancery, and the right of the owner of property to give it such direction as he may choose without its being subject to the debts of those upon whom he intends to confer his bounty.

We are not called upon in this connection to say how far we would feel bound, in a case originating in a State where the doctrine of the English courts had been adopted so as to become a rule of property, if such a proposition could be predicated of a rule like this. Nor has the time which the pressure of business in this court authorizes us to devote to this case permitted any further examination into the decisions of the State courts. We have indicated our views in this matter rather to forestall the inference, that we recognize the doctrine relied on by appellants, and not much controverted by opposing counsel, than because we have felt it necessary to decide it, though the judgment of the court may rest equally well on either of the propositions which we have discussed. We think the decree of the court below may be satisfactorily affirmed on both of them.

Other objections have been urged by counsel; such as that the bankrupt is himself one of the trustees of the will, and will exercise his discretion favorably to himself. But there are two other trustees, and it requires their joint action to confer on him the benefits of this trust. It is said that one of them is mentally incompetent to act; but this is not established by the testimony. It is said also that, since his bankruptcy, the defendant, Amasa, has actually received $25,000 of this fund; and that should go to the assignee, as it shows conclusively that the objections to the validity of the will were well founded.

But the conclusive answer to all these objections is, that, by the will of decedent, — a will which, as we have shown, she had a lawful right to make, — the insolvency of her son terminated all his legal vested right in her estate, and left nothing in him which could go to his creditors, or to his assignees in bankruptcy, or to his prior assignee; and that what may have come to him after his bankruptcy through the voluntary action of the trustees, under the terms of the discretion reposed in them, is his lawfully, and cannot now be subjected to the control of his assignee.

Decree affirmed.[1]

[1] "It is a settled rule of law, that the beneficial interest of the *cestui que trust*, whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary and immunity from his creditors. A condi-

OVERMAN'S APPEAL.

SUPREME COURT OF PENNSYLVANIA. 1879.

[*Reported* 88 *Pa.* 276.]

May 8th, 1878. Before AGNEW, C. J., MERCUR, GORDON, PAXSON, WOODWARD and TRUNKEY, JJ. SHARSWOOD, J., absent.

Appeal from the Orphans' Court of Philadelphia County: Of January Term 1878, No. 91. Certified from the Eastern District.

Appeal of Mary B. Overman from the decree of the court dismissing her exceptions to the report of the auditor to whom was referred the accounts of the surviving executors of William Richardson, deceased.

William Richardson died in 1866, leaving a will, of which the following are the material clauses: —

Item Ninth. — The said income so directed to be paid by my said executors shall be paid to my said children and grandchild, in such way and manner that the same shall be free from the control, contracts, debts, liabilities or engagements of either or any of my said children or grandchild, or the debts, liabilities or engagements of either of the husbands of my said daughters.

Item Tenth. — It is my will, and I do hereby direct, that my executors hereinafter named, and the trustees of any portion of my estate, shall not be personally liable or responsible for any moneys except such as shall be actually received by them individually; nor shall either of them be responsible or liable for the acts of their co-executors or co-trustees to which they do not consent, but each of them liable for their own individual acts and deeds, and for such moneys as shall come into their hands.

The eleventh clause of the will authorized the executors to make partition of lands in Schuylkill and other counties; to purchase the moieties or interests of co-tenants, and to raise the means of purchase by mortgage or otherwise on the lands; and, if deemed expedient in their opinion, to create a joint-stock company to manage the lands; or, "in any way or manner to take action with regard to them" which they should "deem to be manifestly to the interest of the estate."

Of the five appointed, the three surviving and acting executors, being George J. Richardson, a son of the testator, and one of the annuitants under the will, and two sons-in-law, filed several accounts, all of which were referred to Charles Gilpin, Esq., as auditor. After a protracted

tion precedent that the provision shall not vest until his debts are paid, and a condition subsequent that it shall be divested and forfeited by his insolvency, with a limitation over to another person, are valid, and the law will give them full effect. Beyond this, protection from the claims of creditors is not allowed to go." — *Per* SWAYNE, J., in *Nichols* v. *Levy*, 5 Wall. 433, 441 (1866).

series of meetings, the auditor found, in an amended report, that the executors had unlawfully loaned to the firm of Lucas & Co. the sum of $271,759.40, which, owing to the insolvency of that firm, was totally lost: that such books of accounts as had been kept, were claimed to have been lost or mislaid; that further difficulty was offered to the investigation by the prolonged absence of George J. Richardson in North Carolina, on business of his own; "that after Lucas & Co. became embarrassed and loans were made to them, the business of the estate was loosely and carelessly managed by the accountants. Harmony did not prevail between them at all times. Sometimes two acted for the three, and at other times the money affairs were largely under the control of one of them, George J. Richardson. It is impossible to say how far the moneys of the estate were mixed with his own, as there were no regular books of the estate or his own to enable any one to decide that question.

"Your auditor is of opinion that all three are equally blamable for acts of commission and omission, which should not be tolerated in trustees. He does not mean to charge any one of them with taking and using the funds of the estate. He assumes, in the absence of evidence, that they acted honestly in this respect; but he does say and decide, that trustees who act so inharmoniously and carelessly, and by want of proper care of the trust fund cause such losses to the estate, cannot be considered as having earned commissions. . . ."

The auditor found an over-payment to the life-interest of income, or what was supposed by them to be income, and surcharged them with the sum of $579,120.44.

At this stage of the proceedings, the Philadelphia Life, Trust and Insurance Company was appointed executor, and their account was referred to the same auditor. Thereupon, Mary B. Overman, one of the annuitants, claimed the right to have sequestrated in the hands of the accountant the income of George J. Richardson, to meet over-payments of the income or any other indebtedness to the estate incurred by him. The auditor, deciding against this claim, held that: "The case of George J. Richardson, one of the annuitants or life interests, presents features not found in the cases of the other children and grandchild. He was co-executor and trustee, first, with four others, and afterwards with two others. It was contended that neither the trust nor the law applicable to voluntary payments protected him. It was argued that the trust did not protect him, because he was payee with others and receiver himself, and overpaid himself, and became otherwise largely indebted to the estate. There is, in the opinion of your auditor, a full answer to this line of argument.

"The trust is, within the authorities in Pennsylvania, what is called a *spendthrift trust: Fisher* v. *Taylor*, 2 Rawle 33; *Holdship* v. *Patterson*, 7 Watts 547; *Rees* v. *Livingston*, 5 Wright 113; *Ashhurst* v. *Given*, 5 W. & S. 323; *Vaux* v. *Parke*, 7 Id. 19; *Rife* v. *Geyer*, 9 P. F. Smith 393; *Keyser* v. *Mitchell*, 17 Id. 473.

"This trust is sustained by these authorities. The trust is good against all strangers to the estate. It was not contended that it was not good against all strangers, and the authorities fully sustain this view. If so, why not good against a debt due to the estate or to other life-interests or parties in remainder?

"He was not indebted to the testator or his estate at the death; the trust was created by the testator; after his death the indebtedness to the estate originated; how can this new debt rise any higher, occupy any higher plane for any purpose, than any old or new debt of George J. Richardson, as to its effect on the trust created by the testator? The opportunity was afforded to incur a debt to the estate, and whether this was foreseen or unexpected by the testator it gave no power to the debt to the estate, greater than any other debt, to impugn and overthrow the trust.

"Your auditor is, therefore, of the opinion that the income of George J. Richardson in the hands of the present trustee cannot be sequestrated to meet over-payments to income or any other indebtedness to the estate incurred by him, and so decides.

"He therefore decides that all income received and receivable by the new trustee is payable to and divisible among the annuitants named in the will in the proportion therein specified."

The Orphans' Court dismissed the exceptions to this ruling, whereupon Mrs. Overman took this appeal, assigning for error the action of the court in sustaining the decision of the auditor on her claim.

E. Spencer Miller (with whom was *P. F. Rothermel*), for the appellant.

Samuel Dickson (with whom was *J. C. Bullitt*), for the appellee.

CHIEF-JUSTICE AGNEW delivered the opinion of the court, June 24th, 1878.

We must take the facts of this case as found by the auditor. They exhibit a *devastavit* by George J. Richardson, one of the executors and trustees, of a gross kind. Want of harmony in the execution of the trust, loose and careless management, failure to keep proper accounts of their doings, great delay, absence from the trust, improvident loans of very large sums of money, and gross mismanagement, seem to have characterized their transactions. It is upon such a case, the question arises, whether under the will of William Richardson, his father, George J. Richardson, one of the trustees, guilty of this gross mismanagement, is entitled, as a legatee, to his portion of the income set apart to himself and the other children of the testator; or whether it or so much as is necessary, should be retained to answer the portions of his co-legatees. It was held in the court below that he was entitled to his share of the income, notwithstanding his *devastavit*, on the ground that the trust for him and them was a spendthrift trust. This was a mistake resulting from two errors, — one, giving to such a trust a scope unsupported by equity, the other overlooking the plain intent of the testator.

That a trust for a spendthrift, as it is termed, will be upheld in equity, is a settled doctrine of this State, and rests on the donor's right of dominion over his own property for a reasonable time. But it is exceptionable in its very nature, because it contravenes that general policy, which forbids restraints on alienation and the non-payment of honest debts. In order to support it, resort is had to a *trust*, which equity will enforce, and equity necessarily regards its reasonableness and the clearly defined intent of the donor. Without such a trust upheld in equity, title in the devisee or legatee claims to itself control and liability to creditors. As this is a trust resting in equity, it is clear that equity will support it only so long as it rests on the well-defined intention of the donor. When that is gone, the trust falls with the loss of this, the only true basis. A trust to pay income for life may last for the longest period of human existence, and may run for seventy or eighty years. While the law simply tolerates such a trust, it cannot approve of it as contributing to the general public interest. Property tied up for half a century contributes nothing to the general wealth, while it is a great stretch of liberality to the ownership of it to suffer it to remain in this anomalous state for so many years after its owner has left it behind him. Clearly it is against public interest that the property of an after generation shall be controlled by the deed of a former period, or that the non-payment of debts should be encouraged.

The argument of the appellee attributes to a spendthrift trust an inviolability, which transcends all proper notions of equity, in holding that a trustee, because he is also a legatee of a single share, shall be exempt from that valuable rule of equity, which requires a strict performance of duty as essential to the interest of his trust. Indeed, it is a rule of morality as well. Besides, it elevates a single special intent of the testator above the general interests of his estate, and subordinates the welfare of others, equal objects of his bounty to that of the faithless trustee, the object of the single intent. On what principle of equity, which guards this trust for others as well as for him, shall the control of the fund by the defaulting trustee enable him to enjoy his own portion at their expense without accountability? Shall five others go a-begging to enable him to enjoy that which the testator gave him, free from creditors only *when it accrues* to him, as we shall see was the special intent of the testator? There is neither good law nor sound morals in such a proposition.

The express will of the testator in this instance coincides with the general intent. Two things of equal strength are declared in the tenth item. 1st. That the executors or trustees shall not be liable for each other, or one for money received by the other. 2d. But each shall be liable only for his own individual acts and deeds, and for such moneys as shall come into his hands. After this declaration, can it be doubted that the testator intended that each should be liable for his own breach of trust? If not, on what principle can it be held he meant that his liability should be less than the loss he has caused? His portion is a

part of the estate, and how shall it be exempt from a *devastavit*, which affects the portions of others equally the objects of the testator's bounty, and who have no part in the fault which causes the loss? If the *whole* estate is lost by the fault of the trustee, what becomes of his own portion? It is gone with that of the others, and that is the result of the act of the testator, who made him a trustee for himself as well as others. Now, did the testator, in thus clothing him with a power over his whole estate, intend he should not be responsible to any one? If, as trustee, he shall have spent it for his individual use and thus had its benefit, because of his control as trustee, can it be said that the testator meant that he should enjoy his own wholly, while the others should get nothing? The will itself distinguishes between the trustees and the legatees in the very clause conferring protection over the shares given to the latter. Item 9th: "The said income so directed to be *paid* by my said *executors*, *shall be paid* to my said *children and grandchild*, in such way and manner that the same shall be free from the control, contracts, debts, liabilities or engagements of either or any of my said children or grandchild," &c. Thus the trustees are to secure the payment to the legatees in such way that neither creditors nor they shall control the testator's bounty. Thus it is the thing paid or ready to be paid over, which is to be protected, and it is the trustee who must perform the duty of protection when he pays over, and the protection is to be against others. The will presupposes that the executor has performed his duty and is ready to pay over the legacy. Then comes in the idea of protection against creditors and the legatee himself. But what warrant of intention on the part of the testator is there that this protection is to be carried backward to protect the trustee who fails to produce the legacy? Clearly he stands before, and if he fails to produce the things to be protected, he must answer for it both in equity and according to the intent of this testator. If the trustee, having it in his own hands, has squandered his own legacy, it is gone; if that of others, his own must share in the loss, if partial, or make it up if entire. Neither reason nor the intent of the testator relieves it from the effect of a *devastavit*. But if the trustee may squander the shares of others and yet save his own, it will carry the doctrine of a spendthrift trust beyond all our notions of equity and honesty, and fasten upon the testator a special intent in favor of a faithless trustee, and in violation of the same protection he intends for the benefit of the other objects of his bounty. This is unjust. The decree of the Orphans' Court is therefore reversed, and the record ordered to be remitted to carry out the views expressed in the foregoing opinion.

Sharswood, Mercur and Paxson, JJ., dissented.

The court, on motion, ordered a re-argument before a full bench.

On the re-argument at Philadelphia on January 8th 1879, before a full bench, *S. Dickson* submitted an additional brief.

On May 5th 1879, Mr. Justice Woodward delivered the following opinion: —

Notwithstanding the fact stated by the auditor in his first report that one hundred and thirty-three meetings were held before him, and the fact that in the final decree surcharges were made against the trustees under Mr. Richardson's will, amounting to the sum of $579,000, only a single point is in issue in this appeal. That is raised by the assignments of error in which the appellant complains that her exceptions to the report were overruled by the Orphans' Court. The first of these exceptions covers the whole field of this controversy. It was in these words: "She excepts because said auditor has reported in effect that George J. Richardson is entitled to receive from time to time, equally or rateably with the other children of said William Richardson, deceased, a full share of the income of said estate from the said trustees."

By the ninth section of the will of Mr. Richardson, the residue of his estate was vested in his executors in trust, to collect and pay over the income to his wife, children, and a grandchild, during their lives. This provision was made in the concluding clause of the section: "The said income so directed to be paid by my executors shall be paid to my said children and grandchild in such way and manner that the same shall be free from the control, contracts, liabilities or engagements of either or any of my said children or grandchild, or debts, liabilities, or engagements of either of the husbands of my said daughters." Five gentlemen, including George J. Richardson, his son, and two of his sons-in-law, were appointed executors and trustees, no one of whom, it was directed by the tenth section of the will, should be liable for any moneys received, or any acts done by either or any of his co-executors or co-trustees, but only for moneys received or acts done by himself. After the first account was confirmed, Mr. Sparks, one of the trustees, resigned, and Mr. Smethurst, another of them, died, and the estate was thenceforth left under the management of the testator's son and sons-in-law.

Mr. Richardson died on the 24th of January 1866, and soon afterwards the trustees undertook the development and improvement of the coal lands belonging to the estate in the county of Schuylkill. A lease was made to John Lucas & Co., and the advances made to the lessees by the trustees began about the 25th of March 1867, and were continued until they amounted to $271,759.40, with which sum the trustees were surcharged by the auditor. The enterprise was ruinous from the outset. Lucas & Co. finally failed. The report found that the trustees "had no power under the will to make such loans," and that no law existed "to sustain such use of trust funds." It found also that "after Lucas & Co. became embarrassed and loans were made to them, the business of the estate was loosely and carelessly managed by the accountants; that sometimes two acted for the three, and at other times the money affairs were largely under the control of George J. Richardson," and that it was "impossible to say how far the moneys of the estate were mixed with his own, as there were no regular books of the estate or his own to enable any one to decide that question."

Under these facts, it has been strongly urged on behalf of the appellant, that the right of George J. Richardson to receive his share of the current and prospective income of the estate has become forfeit. The allegation was that he joined with the other trustees in a negligent or fraudulent waste of a sum, the interest on which would largely exceed the income of what remained.

The argument was pressed with some feeling and much force. Analogies that were more or less apt were suggested. But analogies are as likely to misguide as to guide safely. Just the facts as they stand in this record are to be fairly met. The auditor said that while there had been carelessness, mismanagement and mistake on the part of the trustees, he did "not mean to charge any of them with taking and using the funds of the estate," and he assumed, in the absence of evidence, that they acted honestly in this respect, and disastrous as the results of the effort to develop the Schuylkill lands proved to be, the general powers conferred by the will on the trustees were very large. By the eleventh section they were authorized to make partition of lands in Schuylkill or other counties, to purchase the moieties or interest of co-tenants, and to raise the means of purchase by mortgage or otherwise on the lands. They were authorized also, if expedient in their opinion, to create a joint-stock company to manage the lands, "or in any way or manner to take action with regard to them" which they should "deem to be manifestly to the interest" of the estate. Under a charter so broad as this they entered into the Lucas lease and made advance after advance, upon assurances of certain and near success that are always given, and with the glowing hopes and firm faith which often unhinge or cloud the judgment of very prudent men when they are searching for sources of wealth that are hidden in the earth. Besides, the income to be paid to George J. Richardson was to be free from his own "control, contracts, debts, liabilities, or engagements." He has not anticipated his income, for the auditor found that no charge of "taking and using the funds of the estate" was made out against him. It is true that the tenth section of the will made him, as well as each of the other trustees, responsible for his own acts. But as was said in the very able argument of his counsel, that section "did not create any other liability than such as the law would create without it. Had it been omitted, his liability to the estate would have been what it is now — neither more or less." It happens that he has become liable to his father's estate, and not to a stranger. But it was from "liabilities" of all kinds that the income given him was to be protected.

Nothing is better settled than the rule which sustains such trusts as this. It has produced beneficent and just results. And it ought not to be evaded or infringed in any case that is fairly within its scope.

Decree affirmed at the cost of the appellants, and appeal dismissed.

BROADWAY BANK *v.* ADAMS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1882.

[*Reported* 133 *Mass.* 170.]

MORTON, C. J. The object of this bill in equity is to reach and apply in payment of the plaintiff's debt due from the defendant Adams the income of a trust fund created for his benefit by the will of his brother. The eleventh article of the will is as follows: "I give the sum of seventy-five thousand dollars to my said executors and the survivors or survivor of them, in trust to invest the same in such manner as to them may seem prudent, and to pay the net income thereof semi-annually, to my said brother Charles W. Adams, during his natural life, such payments to be made to him personally when convenient, otherwise, upon his order or receipt in writing; in either case free from the interference or control of his creditors, my intention being that the use of said income shall not be anticipated by assignment. At the decease of my said brother Charles, my will is that the net income of said seventy-five thousand dollars shall be paid to his present wife, in case she survives him, for the benefit of herself and all the children of said Charles, in equal proportions, in the manner and upon the conditions the same as herein directed to be paid him during his life, so long as she shall remain single. And my will is, that, after the decease of said Charles and the decease or second marriage of his said wife, the said seventy-five thousand dollars, together with any accrued interest or income thereon which may remain unpaid, as herein above directed, shall be divided equally among all the children of my said brother Charles, by any and all his wives, and the representatives of any deceased child or children by right of representation."

There is no room for doubt as to the intention of the testator. It is clear that, if the trustee was to pay the income to the plaintiff under an order of the court, it would be in direct violation of the intention of the testator and of the provisions of his will. The court will not compel the trustee thus to do what the will forbids him to do, unless the provisions and intention of the testator are unlawful.

The question whether the founder of a trust can secure the income of it to the object of his bounty, by providing that it shall not be alienable by him or be subject to be taken by his creditors, has not been directly adjudicated in this Commonwealth. The tendency of our decisions, however, has been in favor of such a power in the founder. *Braman* v. *Stiles*, 2 Pick. 460; *Perkins* v. *Hays*, 3 Gray, 405; *Russell* v. *Grinnell*, 105 Mass. 425; *Hall* v. *Williams*, 120 Mass. 344; *Sparhawk* v. *Cloon*, 125 Mass. 263.

It is true that the rule of the common law is, that a man cannot attach to a grant or transfer of property, otherwise absolute, the con-

dition that it shall not be alienated; such condition being repugnant to the nature of the estate granted. Co. Lit. 223 a; *Blackstone Bank* v. *Davis*, 21 Pick. 42.

Lord Coke gives as the reason of the rule, that "it is absurd and repugnant to reason that he, that hath no possibility to have the land revert to him, should restrain his feoffee in fee simple of all his power to alien," and that this is "against the height and purity of a fee simple." By such a condition, the grantor undertakes to deprive the property in the hands of the grantee of one of its legal incidents and attributes, namely, its alienability, which is deemed to be against public policy. But the reasons of the rule do not apply in the case of a transfer of property in trust. By the creation of a trust like the one before us, the trust property passes to the trustee with all its incidents and attributes unimpaired. He takes the whole legal title to the property, with the power of alienation; the *cestui que trust* takes the whole legal title to the accrued income at the moment it is paid over to him. Neither the principal nor the income is at any time inalienable.

The question whether the rule of the common law should be applied to equitable life estates created by will or deed, has been the subject of conflicting adjudications by different courts, as is fully shown in the able and exhaustive arguments of the counsel in this case. As is stated in *Sparhawk* v. *Cloon*, above cited, from the time of Lord Eldon the rule has prevailed in the English Court of Chancery, to the extent of holding that when the income of a trust estate is given to any person (other than a married woman) for life, the equitable estate for life is alienable by, and liable in equity to the debts of, the *cestui que trust*, and that this quality is so inseparable from the estate that no provision, however express, which does not operate as a cesser or limitation of the estate itself, can protect it from his debts. *Brandon* v. *Robinson*, 18 Ves. 429; *Green* v. *Spicer*, 1 Russ. & Myl. 395; *Rochford* v. *Hackman*, 9 Hare, 475; *Trappes* v. *Meredith*, L. R. 9 Eq. 229; *Snowdon* v. *Dales*, 6 Sim. 524; *Rippon* v. *Norton*, 2 Beav. 63.

The English rule has been adopted in several of the courts of this country. *Tillinghast* v. *Bradford*, 5 R. I. 205; *Heath* v. *Bishop*, 4 Rich. Eq. 46; *Dick* v. *Pitchford*, 1 Dev. & Bat. Eq. 480; *Mebane* v. *Mebane*, 4 Ired. Eq. 131.

Other courts have rejected it, and have held that the founder of a trust may secure the benefit of it to the object of his bounty, by providing that the income shall not be alienable by anticipation, nor subject to be taken for his debts. *Holdship* v. *Patterson*, 7 Watts, 547; *Shankland's Appeal*, 47 Penn. St. 113; *Rife* v. *Geyer*, 59 Penn. St. 393; *White* v. *White*, 30 Vt. 338; *Pope* v. *Elliott*, 8 B. Mon. 56; *Nichols* v. *Eaton*, 91 U. S. 716; *Hyde* v. *Woods*, 94 U. S. 523.

The precise point involved in the case at bar has not been adjudicated in this Commonwealth; but the decisions of this court which we have before cited recognize the principle, that, if the intention of the founder of a trust, like the one before us, is to give to the equitable

life tenant a qualified and limited, and not an absolute, estate in the income, such life tenant cannot alienate it by anticipation, and his creditors cannot reach it at law or in equity. It seems to us that this principle extends to and covers the case at bar. The founder of this trust was the absolute owner of his property. He had the entire right to dispose of it, either by an absolute gift to his brother, or by a gift with such restrictions or limitations, not repugnant to law, as he saw fit to impose. His clear intention, as shown in his will, was not to give his brother an absolute right to the income which might hereafter accrue upon the trust fund, with the power of alienating it in advance, but only the right to receive semi-annually the income of the fund, which upon its payment to him, and not before, was to become his absolute property. His intentions ought to be carried out, unless they are against public policy. There is nothing in the nature or tenure of the estate given to the *cestui que trust* which should prevent this. The power of alienating in advance is not a necessary attribute or incident of such an estate or interest, so that the restraint of such alienation would introduce repugnant or inconsistent elements.

We are not able to see that it would violate any principles of sound public policy to permit a testator to give to the object of his bounty such a qualified interest in the income of a trust fund, and thus provide against the improvidence or misfortune of the beneficiary. The only ground upon which it can be held to be against public policy is, that it defrauds the creditors of the beneficiary.

It is argued that investing a man with apparent wealth tends to mislead creditors, and to induce them to give him credit. The answer is, that creditors have no right to rely upon property thus held, and to give him credit upon the basis of an estate which, by the instrument creating it, is declared to be inalienable by him, and not liable for his debts. By the exercise of proper diligence they can ascertain the nature and extent of his estate, especially in this Commonwealth, where all wills and most deeds are spread upon the public records. There is the same danger of their being misled by false appearances, and induced to give credit to the equitable life tenant when the will or deed of trust provides for a cesser or limitation over, in case of an attempted alienation, or of bankruptcy or attachment, and the argument would lead to the conclusion that the English rule is equally in violation of public policy. We do not see why the founder of a trust may not directly provide that his property shall go to his beneficiary with the restriction that it shall not be alienable by anticipation, and that his creditors shall not have the right to attach it in advance, instead of indirectly reaching the same result by a provision for a cesser or a limitation over, or by giving his trustees a discretion as to paying it. He has the entire *jus disponendi*, which imports that he may give it absolutely, or may impose any restrictions or fetters not repugnant to the nature of the estate which he gives. Under our system, creditors may reach all the property of the debtor not exempted by law, but they cannot

enlarge the gift of the founder of a trust, and take more than he has given.

The rule of public policy which subjects a debtor's property to the payment of his debts, does not subject the property of a donor to the debts of his beneficiary, and does not give the creditor a right to complain that, in the exercise of his absolute right of disposition, the donor has not seen fit to give the property to the creditor, but has left it out of his reach.

Whether a man can settle his own property in trust for his own benefit, so as to exempt the income from alienation by him or attachment in advance by his creditors, is a different question, which we are not called upon to consider in this case. But we are of opinion that any other person, having the entire right to dispose of his property, may settle it in trust in favor of a beneficiary, and may provide that it shall not be alienated by him by anticipation, and shall not be subject to be seized by his creditors in advance of its payment to him.

It follows that, under the provisions of the will which we are considering, the income of the trust fund created for the benefit of the defendant Adams cannot be reached by attachment, either at law or in equity, before it is paid to him.

Bill dismissed.

The case was argued at the bar in November, 1881, and reargued in March, 1882, by *J. R. Churchill*, for the plaintiff; by *R. D. Smith* and *W. W. Vaughan*, for the defendant Adams; and by *E. F. Hodges*, for the trustee.

PACIFIC BANK *v.* WINDRAM.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1882.

[*Reported* 133 *Mass.* 175.]

MORTON, C. J. The defendant, Mrs. Windram, after her marriage, being possessed in her own right of personal property, conveyed it to trustees by an indenture dated in March 1879. The trusts declared by the indenture are, that the trustees are to pay the net income to her semi-annually during her life "upon her sole and separate order or receipt, the same not to be by way of anticipation," and to pay the principal to her children upon her death, or when, after her death, they arrive at the age of thirty years, except as to a sum not exceeding twenty-five thousand dollars, over which she retains a power of appointment by will.

After this settlement in trust, she jointly with her husband borrowed a large sum of money of the plaintiff, and, as security therefor, assigned and transferred to the plaintiff, by an instrument in which her husband

joined, all her right and interest to and in the income of said trust fund accruing under the said indenture. The object of this bill in equity, which is brought under the Gen. Sts. *c.* 113, § 2, *cl.* 11, is to reach and apply, in payment of the plaintiff's debt, the income to which she became entitled under the indenture after the assignment to the plaintiff. The provision that the trustees are to pay the net income to her upon her sole receipt, and not "by way of anticipation," is clearly intended to restrain the power of the *cestui que trust* to alienate the income in advance; and the case therefore raises the question, whether such restraint of alienation is valid as against subsequent creditors or purchasers with notice.

It was decided in the case of *Broadway National Bank* v. *Adams*, 133 Mass. 170, that the founder of a trust for the benefit of another may by suitable provisions restrain the power of the *cestui que trust* to alienate the income by anticipation, and protect the income from the claims of his creditors until it is paid over to him. In that case, it was not necessary to consider whether a man could settle his own property in trust to pay the income to himself with a like restraint of alienation which would be valid. It seems to us that the two questions are quite different.

The general policy of our law is, that creditors shall have the right to resort to all the property of the debtor, except so far as the Statutes exempt it from liability for his debts. But this policy does not subject to the debts of the debtor the property of another, and is not defeated when the founder of a trust is a person other than the debtor. In such case, the founder, having the entire *jus disponendi* in disposing of his own property, sees fit to give to his beneficiary a qualified and limited, instead of an absolute, interest in the income. Creditors of the beneficiary have no right to complain that the founder did not give his property for their benefit, or that they cannot reach a greater interest in the property than the debtor has, or ever had. But when a man settles his property upon a trust in his own favor, with a clause restraining his power of alienating the income, he undertakes to put his own property out of the reach of his creditors, while he retains the beneficial use of it. The practical operation of the transaction is, that he transfers a portion only of his interest, retaining in himself a beneficial interest, which he attempts by his own act to render inalienable by himself and exempt from liability for his debts.

To permit a man thus to attach to a valuable interest in property retained by himself the quality of inalienability and of exemption from his debts, seems to us to be going further than a sound public policy will justify. No authorities are cited in favor of such a rule. In England it is the settled rule that the founder of a trust in favor of a third person (except married women) cannot, by a clause restraining alienation, put the income out of the reach of the creditors of the beneficiary. See cases cited in *Broadway National Bank* v. *Adams*.

In Pennsylvania, where the English rule is rejected, and the same

rule, as to the power of a founder of a trust in favor of a third person, adopted by us in *Broadway National Bank* v. *Adams*, is upheld, the courts yet hold that a person cannot so settle his own property in trust, as to put his right to the income retained by him beyond the reach of his creditors, by a provision against alienation or otherwise. *Johnston* v. *Harvy*, 2 Penn. 82; *Mackason's Appeal*, 42 Penn. St. 330. See also *Lackland* v. *Smith*, 5 Mo. App. 153.

It is true that a man, who is not indebted, may by a voluntary conveyance made in good faith transfer his property so as to put it out of the reach of future creditors. When a man transfers a trust fund, of which the income is to be paid to him during his life, and the principal at his death to be paid or transferred to others, the principal may be beyond the reach of his future creditors; but we are of opinion that his right to the income which he retains in himself may be alienated by him, is liable for his debts, and may be reached in equity.

Another question, not free from difficulty, arises in this case, and that is whether this rule applies in the case of a conveyance of her property in trust by a married woman. In England, where, as we have before said, the general rule is that restraints of alienation in wills or deeds are invalid, the Court of Chancery from the time of Lord Thurlow has recognized an exception to the rule in favor of married women. *Parkes* v. *White*, 11 Ves. 209; *Jackson* v. *Hobhouse*, 2 Meriv. 483; *Woodmeston* v. *Walker*, 2 Russ. & Myl. 197. Numerous other cases might be cited.

The reason of the exception is, that a married woman is not *sui juris*, and that such a restraint of her power of alienation is necessary as a protection to her against the coercion and influence of her husband.

By the common law of England, a married woman could not hold any separate property. The settlement upon her by means of a trust of an equitable separate estate, was the invention of equity, and the Court of Chancery allowed the clause against anticipation, in order to give full effect to the estate itself, and to secure to her, free from the influence of the husband, the benefit intended by the settler.

But the legislation of this Commonwealth has essentially changed the common law status of a married woman, especially in respect to her holding separate property. By our Statutes, a married woman is now enabled to take, hold, manage and dispose of property, to make contracts, and to sue and be sued, in the same manner as if she were *sole*. Pub. Sts. *c.* 147. Except as to dealings with her husband, she is made a person *sui juris*. The Statute intends, what it declares, that she shall hold her separate property in the same manner as if she were *sole*, with the same rights and privileges, and also subject to the same rules, responsibilities and liabilities, as a *feme sole*.

Courts of equity upheld the restraint of alienation in favor of a married woman because of her disability during coverture, and as an incident of the trust estate necessary for her protection. The Statutes having removed her disability, and having made unnecessary the creation

of a trust estate, the incidents of the trust estate and the equitable rights growing out of it no longer remain in her favor. She is put upon the same footing as if she were a *feme sole*. She no longer needs any protection against the marital rights of her husband. It is argued that she still needs protection against his persuasion and undue influence. The Statutes have made such provisions as were deemed necessary to meet this danger, by providing that, upon her application to the Supreme Judicial Court, a trustee may be appointed, and she may thereupon convey her separate estate to the trustee upon such trusts and to such uses as she may declare. Pub. Sts. *c.* 147, § 13.

For these reasons, we are of opinion that the provision in the indenture of March, 1879, intended to restrain Mrs. Windram's power of alienating the income of the trust fund, is invalid; and that the plaintiff is entitled to the income after the assignment to it, or after notice thereof was given to the trustees, if they have paid it to Mrs. Windram before such notice.

We need not consider what effect the modification of the trusts made in September, 1880, may have upon the rights of other parties. By this modification, the trustees, instead of paying the income to Mrs. Windram, were to disburse it for her benefit, as they should see fit. It is clear that it would be a gross fraud to allow it to defeat the rights of the plaintiff under its prior assignment, and the presiding justice who heard the case rightly ruled that it was incompetent and immaterial as against the plaintiff.

The result is, that the plaintiff is entitled to a decree, the terms of which must be settled before a single justice.

Decree for the plaintiff.[1]

E. S. Mansfield, for the plaintiff.

A. S. Wheeler and *J. H. Young*, for the defendants.

[1] See *Jackson* v. *Von Zedlitz*, 136 Mass. 342 (1884); and cf. *Holmes* v. *Penney*, 3 K. & J. 90 (1856).

BOOK X.

PRIORITY.

CHAPTER I.

FRAUDULENT CONVEYANCES.

SECTION I.

CONVEYANCES IN FRAUD OF CREDITORS.

St. 13 Eliz. c. 5 (1570). — For the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore: (2) which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, not only to the let or hinderance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued:

II. Be it therefore declared, ordained and enacted by the authority of this present Parliament, That all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, (2) and all and every bond, suit, judgment and execution, at any time had or made sithence the beginning of the Queen's Majesty's reign that now is, or at any time hereafter to be had or made, (3) to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots,

mortuaries and reliefs, by such guileful, covinous or fraudulent devices and practices, as is aforesaid, are, shall or might be in any wise disturbed, hindered, delayed or defrauded) to be clearly and utterly void, frustrate and of none effect; any pretence, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

III. And be it further enacted by the authority aforesaid, That all and every the parties to such feigned, covinous or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions and other things before expressed, and being privy and knowing of the same, or any of them; (2) which at any time after the tenth day of June next coming shall wittingly and willingly put in ure, avow, maintain, justify or defend the same, or any of them, as true, simple, and done, had or made *bona fide* and upon good consideration; (3) or shall alien or assign any the lands, tenements, goods, leases or other things before-mentioned, to him or them conveyed as is aforesaid, or any part thereof; (4) shall incur the penalty and forfeiture of one year's value of the said lands, tenements and hereditaments, leases, rents, commons or other profits, of or out of the same; (5) and the whole value of the said goods and chattels; (6) and also so much money as are or shall be contained in any such covinous and feigned bond; (7) the one moiety whereof to be to the Queen's Majesty, her heirs and successors, and the other moiety to the party or parties grieved by such feigned and fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, leases, rents, commons, profits, charges and other things aforesaid, to be recovered in any of the Queen's courts of record by action of debt, bill, plaint or information, wherein no essoin, protection or wager of law shall be admitted for the defendant or defendants; (8) and also being thereof lawfully convicted, shall suffer imprisonment for one half year without bail or mainprise.

VI. Provided also, and be it enacted by the authority aforesaid, That this Act, or anything therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which estate or interest is or shall be upon good consideration and *bona fide* lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud or collusion as is aforesaid; anything before mentioned to the contrary hereof notwithstanding.

VII. This Act to endure unto the end of the first session of the next Parliament.[1]

[1] This Act was made perpetual by St. 29 Eliz. c. 5.

TWYNE'S CASE.

STAR CHAMBER. 1602.

[*Reported* 3 *Co.* 80 *b.*]

IN an information by *Coke*, the Queen's Attorney-General, against Twyne of Hampshire, in the Star Chamber, for making and publishing of a fraudulent gift of goods: the case on the Stat. of 13 Eliz. *cap.* 5, was such; Pierce was indebted to Twyne in four hundred pounds, and was indebted also to C. in two hundred pounds. C. brought an action of debt against Pierce, and pending the writ, Pierce being possessed of goods and chattels of the value of three hundred pounds, in secret made a general deed of gift of all his goods and chattels real and personal whatsoever to Twyne, in satisfaction of his debt; notwithstanding that Pierce continued in possession of the said goods, and some of them he sold; and he shore the sheep, and marked them with his own mark: and afterwards C. had judgment against Pierce, and had a *fieri facias* directed to the sheriff of Southampton, who by force of the said writ came to make execution of the said goods; but divers persons, by the command of the said Twyne, did with force resist the said sheriff, claiming them to be the goods of the said Twyne by force of the said gift; and openly declared by the commandment of Twyne, that it was a good gift, and made on a good and lawful consideration. And whether this gift on the whole matter, was fraudulent and of no effect by the said Act of 13 Eliz. or not, was the question. And it was resolved by SIR THOMAS EGERTON, Lord Keeper of the Great Seal, and by the CHIEF JUSTICE POPHAM and ANDERSON, and the whole Court of Star Chamber, that this gift was fraudulent, within the Statute of 13 Eliz. And in this case divers points were resolved: —

1st. That this gift had the signs and marks of fraud, because the gift is general, without exception of his apparel, or anything of necessity; for it is commonly said, *quod dolus versatur in generalibus.*

2d. The donor continued in possession, and used them as his own; and by reason thereof he traded and trafficked with others, and defrauded and deceived them.

3d. It was made in secret, *et dona clandestina sunt semper suspiciosa.*

4th. It was made pending the writ.

5th. Here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and a trust is the cover of fraud.

6th. The deed contains, that the gift was made honestly, truly, and *bona fide; et clausulæ inconsuet' semper inducunt suspicionem.*

Secondly, it was resolved, that notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, yet it was not

within the proviso of the said Act of 13 Eliz. by which it is provided, that the said Act shall not extend to any estate or interest in lands, &c. goods or chattels made on a good consideration and *bona fide;* for although it is on a true and good consideration, yet it is not *bona fide*, for no gift shall be deemed to be *bona fide* within the said proviso which is accompanied with any trust; as if a man be indebted to five several persons, in the several sums of twenty pounds, and hath goods of the value of twenty pounds, and makes a gift of all his goods to one of them in satisfaction of his debt, but there is a trust between them, that the donee shall deal favorably with him in regard of his poor estate, either to permit the donor, or some other for him, or for his benefit, to use or have possession of them, and is contented that he shall pay him his debt when he is able; this shall not be called *bona fide* within the said proviso; for the proviso saith on a good consideration, and *bona fide;* so a good consideration doth not suffice, if it be not also *bona fide:* and therefore, reader, when any gift shall be to you in satisfaction of a debt, by one who is indebted to others also; 1st, Let it be made in a public manner, and before the neighbors, and not in private, for secrecy is a mark of fraud. 2d, Let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt. 3d, Immediately after the gift, take the possession of them; for continuance of the possession in the donor, is a sign of trust. And know, reader, that the said words of the proviso, on a good consideration, and *bona fide*, do not extend to every gift made *bona fide;* and therefore there are two manners of gifts on a good consideration, *scil.* consideration of nature or blood, and a valuable consideration. As to the first, in the case before put; if he who is indebted to five several persons, to each party in twenty pounds, in consideration of natural affection, gives all his goods to his son, or cousin, in that case, forasmuch as others should lose their debts, &c. which are things of value, the intent of the Act was, that the consideration in such case should be valuable; for equity requires, that such gift, which defeats others, should be made on as high and good consideration as the things which are thereby defeated are; and it is to be presumed, that the father, if he had not been indebted to others, would not have dispossessed himself of all his goods, and subjected himself to his cradle; and therefore it shall be intended, that it was made to defeat his creditors: and if consideration of nature or blood should be a good consideration within this proviso, the Statute would serve for little or nothing, and no creditor would be sure of his debt. And as to gifts made *bona fide*, it is to be known, that every gift made *bona fide*, either is on a trust between the parties, or without any trust; every gift made on a trust is out of this proviso: for that which is betwixt the donor and donee, called a trust *per nomen speciosum*, is in truth, as to all the creditors, a fraud, for they are thereby defeated and defrauded of their true and due debts. And every trust is either expressed, or implied: an express trust is, when in the

gift, or upon the gift, the trust by word or writing is expressed: a trust implied is, when a man makes a gift without any consideration, or on a consideration of nature, or blood only: and therefore, if a man before the Stat. of 27 H. 8 had bargained his land for a valuable consideration to one and his heirs, by which he was seised to the use of the bargainee; and afterwards the bargainor, without a consideration, enfeoffed others, who had no notice of the said bargain; in this case the law implies a trust and confidence, and they shall be seised to the use of the bargainee: so in the same case, if the feoffees, in consideration of nature, or blood, had without a valuable consideration enfeoffed their sons, or any of their blood who had no notice of the first bargain, yet that shall not toll the use raised on a valuable consideration; for a feoffment made only on consideration of nature or blood, shall not toll an use raised on a valuable consideration but shall toll an use raised on consideration of nature, for both considerations are *in æquali jure*, and of one and the same nature.

And when a man, being greatly indebted to sundry persons, makes a gift to his son, or any of his blood, without consideration, but only of nature, the law intends a trust betwixt them, *scil.* that the donee would, in consideration of such gift being voluntarily and freely made to him, and also in consideration of nature, relieve his father, or cousin, and not see him want who had made such gift to him, *vide* 33 H. 6, 33, by Prisot, if the father enfeoffs his son and heir apparent within age *bona fide*, yet the lord shall have the wardship of him: so note, valuable consideration is a good consideration within this proviso; and a gift made *bona fide* is a gift made without any trust either expressed or implied: by which it appears, that as a gift made on a good consideration, if it be not also *bona fide*, is not within the proviso; so a gift made *bona fide*, if it be not on a good consideration, is not within the proviso; but it ought to be on a good consideration, and also *bona fide*.

To one who marvelled what should be the reason that Acts and Statutes are continually made at every parliament without intermission, and without end, a wise man made a good and short answer, both which are well composed in verse.

> "Quæritur, ut crescunt tot magna volumina legis?
> In promptu causa est, crescit in orbe dolus."

And because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole court, that all Statutes made against fraud should be liberally and beneficially expounded to suppress the fraud. Note, reader, according to their opinions, divers resolutions have been made.

Between *Pauncefoot* and *Blunt*, in the Exchequer Chamber, Mich. 35 and 36 El. the case was: Pauncefoot being indicted for recusancy, for not coming to divine service, and having an intent to flee beyond sea, and to defeat the Queen of all that might accrue to her for his

recusancy or flight, made a gift of all his leases and goods of great value, colored with feigned consideration, and afterwards he fled beyond sea, and afterwards was outlawed on the same indictment: and whether this gift should be void to defeat the Queen of her forfeiture, either by the common law, or by any Statute, was the question: and some conceived, that the common law, which abhors all fraud, would make void this gift as to the Queen, *vide* Mich. 12 and 13 El. Dyer 295, 4 and 5 P. & M. 160. And the Stat. of 50 E. 3, *cap.* 6, was considered; but that extends only in relief of creditors, and extends only to such debtors as flee to sanctuaries, or other privileged places: but some conceived, that the Stat. of 3 H. 7, *cap.* 4, extends to this case. For although the preamble speaks only of creditors; yet it is provided by the body of the Act generally, that all gifts of goods and chattels made or to be made on trust to the use of the donor, shall be void and of no effect, but that is to be intended as to all strangers who are to have prejudice by such gift, but between the parties themselves it stands good: but it was resolved by all the barons, that the Stat. 13 Eliz. *c.* 5, extends to it, for thereby it is enacted and declared, that all feoffments, gifts, grants, &c. "to delay, hinder or defraud creditors, and others, of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs," shall be void, &c. So that this Act doth not extend only to creditors, but to all others who had cause of action, or suit, or any penalty, or forfeiture, &c.

And it was resolved, that this word "forfeiture" should not be intended only of a forfeiture of an obligation, recognizance, or such like (as it was objected by some, that it should, in respect that it comes after damage and penalty) but also to everything which shall by law be forfeited to the king or subject. And therefore if a man, to prevent a forfeiture for felony, or by outlawry makes a gift of all his goods, and afterwards is attainted or outlawed, these goods are forfeited notwithstanding this gift: the same law of recusants, and so the Statute is expounded beneficially to suppress fraud. Note well this word "declare" in the Act of 13 Eliz. by which the parliament expounded, that this was the common law before. And according to this resolution it was decreed, Hil. 36 Eliz. in the Exchequer Chamber.

Mich. 42 and 43 Eliz. in the Common Pleas, on evidence to a jury, between *Standen* and *Bullock*, these points were resolved by the whole court on the Stat. of 27 El. *c.* 4. Walmsley, J., said, that Sir Christopher Wray, late C. J. of England, reported to him, that he, and all his companions of the King's Bench were resolved, and so directed a jury on evidence before them; that where a man had conveyed his land to the use of himself for life, and afterwards to the use of divers others of his blood, with a future power of revocation, as after such feast, or after the death of such one; and afterwards, and before the power of revocation began, he, for valuable consideration, bargained and sold the land to another and his heirs: this bargain and sale is within the

remedy of the said Statute. For although the Statute saith, "the said first conveyance not by him revoked, according to the power by him reserved," which seems by the literal sense to be intended of a present power of revocation, for no revocation can be made by force of a future power until it comes *in esse:* yet it was held that the intent of the Act was, that such voluntary conveyance which was originally subject to a power of revocation, be it *in præsenti* or *in futuro*, should not stand against a purchaser *bona fide* for a valuable consideration; and if other construction should be made, the said Act would serve for little or no purpose, and it would be no difficult matter to evade it: so if A. had reserved to himself a power of revocation with the assent of B. and afterwards A. bargained and sold the land to another, this bargain and sale is good, and within the remedy of the said Act; for otherwise the good provision of the Act, by a small addition, and evil invention, would be defeated.

And on the same reason it was adjudged, 38 Eliz. in the Common Pleas, between *Lee* and his wife executrix of one Smith, plaintiff, and *Mary Colshil*, executrix of Thomas Colshil, defendant, in debt on an obligation of one thousand marks, Rot. 1707: the case was, Colshil the testator had the office of the Queen's customer, by letters patent, to him and his deputies; and by indenture between him and Smith, the testator of the plaintiff, and for six hundred pounds paid, and one hundred pounds per annum to be paid during the life of Colshil, made a deputation of the said office to Smith; and Colshil covenanted with Smith, that if Colshil should die before him, that then his executors should repay him three hundred pounds. And divers covenants were in the said indenture concerning the said office, and the enjoying of it: and Colshil was bound to the said Smith in the said obligation to perform the covenants; and the breach was alleged in the non-payment of the said three hundred pounds, forasmuch as Smith survived Colshil: and although the said covenant to repay the three hundred pounds was lawful, yet forasmuch as the rest of the covenants were against the Statute of 5 E. 6, *cap.* 16, and if the addition of a lawful covenant should make the obligation of force as to that, the Statute would serve for little or no purpose; for this cause it was adjudged, that the obligation was utterly void.

2d, It was resolved. that if a man hath power of revocation, and afterwards, to the intent to defraud a purchaser, he levies a fine, or makes a feoffment, or other conveyance to a stranger, by which he extinguishes his power, and afterwards bargains and sells the land to another for a valuable consideration, the bargainee shall enjoy the land, for as to him, the fine, feoffment, or other conveyances, by which the condition was extinct, was void by the said Act; and so the first clause, by which all fraudulent and covinous conveyances are made void as to purchasers, extend to the last clause of the Act, *scil.* when he who makes the bargain and sale had power of revocation. And it was said, that the Statute of 27 El. hath made voluntary estates made

with power of revocation, as to purchasers, in equal degree with conveyances made by fraud and covin to defraud purchasers.

Between *Upton* and *Basset* in trespass, Trin. 37 El. in the Common Pleas, it was adjudged, that if a man makes a lease for years, by fraud and covin, and afterwards makes another lease *bona fide*, but without fine or rent reserved, that the second lessee should not avoid the first lease.

For first it was agreed, that by the common law an estate made by fraud should be avoided only by him who had a former right, title, interest, debt or demand, as 33 H. 6, a sale in open market by covin shall not bar a right which is more ancient: nor a covinous gift shall not defeat execution in respect of a former debt, as it is agreed in 22 Ass. 72, but he who hath right, title, interest, debt or demand, more puisne, shall not avoid a gift or estate precedent by fraud by the common law.

2d, It was resolved, that no purchaser should avoid a precedent conveyance made by fraud and covin, but he who is a purchaser for money or other valuable consideration, for although in the preamble it is said "for money or other good consideration," and likewise in the body of the Act, "for money or other good consideration," yet these words "good consideration" are to be intended only of valuable consideration; and that appears by the clause which concerns those who had power of revocation; for there it is said, for money or other good consideration paid, or given, and this word "paid" is to be referred to "money," and "given" is to be referred to "good consideration," so the sense is for money paid, or other good consideration given, which words exclude all considerations of nature or blood, or the like, and are to be intended only of valuable considerations which may be given; and therefore he who makes a purchase of land for a valuable consideration, is only a purchaser within this Statute. And this latter clause doth well expound these words "other good consideration" mentioned before in the preamble and body of the Act.

And so it was resolved, Pasch. 32 El. in a case referred out of the Chancery to the consideration of Windham and Periam, Justices: between *John Nedham* plaintiff, and *Beaumont* serjeant at law, defendant: where the case was, Henry Babington seised in fee of the manor of Lit-Church in the county of Derby, by indenture 10 February 8 El. covenanted with the Lord Darcy, for the advancement of such heirs male, as well those he had begot, as those he should afterwards beget on the body of Mary then his wife (sister to the said Lord Darcy) before the feast of St. John Baptist then next following, to levy a fine of the said manor to the use of the said Henry for his life, and afterwards to the use of the eldest issue male of the bodies of the said Henry and Mary begotten in tail, &c. and so to three issues of their bodies, &c. with the remainder to his right heirs. And afterwards 8 Maii, ann. 8 Eliz. Henry Babington, by fraud and covin, to defeat the said covenant, made a lease of the said manor for a great number of years, to

Robert Heys; and afterwards levied the fine accordingly: and on conference had with the other justices, it was resolved, that although the issue was a purchaser, yet he was not a purchaser in vulgar and common intendment: also consideration of blood, natural affection, is a good consideration, but not such a good consideration which is intended by the Stat. of 27 Eliz. for a valuable consideration is only a good consideration within that Act: in this case Anderson C. J. of the Common Pleas, said, that a man who was of small understanding, and not able to govern the lands which descended to him, and being given to riot and disorder, by mediation of his friends, openly conveyed his lands to them, on trust and confidence that he should take the profits for his maintenance, and that he should not have power to waste and consume the same; and afterwards, he being seduced by deceitful and covinous persons, for a small sum of money bargained and sold his land, being of a great value: this bargain, although it was for money, was holden to be out of this Statute: for this Act is made against all fraud and deceit, and doth not help any purchaser, who doth not come to the land for a good consideration lawfully and without fraud or deceit; and such conveyance made on trust is void as to him who purchases the land for a valuable consideration *bona fide*, without deceit or cunning.

And by the judgment of the whole court Twyne was convicted of fraud, and he and all the others of a riot.

EDWARDS *v.* HARBEN.

King's Bench. 1788.

[*Reported* 2 *T. R.* 587.]

Assumpsit for goods sold to the defendant's testator. The defendant pleaded that he was not executor, nor had ever administered as such; and, secondly, that he had fully administered, &c. Replication, that he had administered divers goods, &c. of the testator; and issue thereon. And to the second plea, that the defendant, at the time of exhibiting the plaintiff's bill, had, and still has, goods and chattels of the deceased in his hands sufficient to satisfy the plaintiff's demands; and issue thereon. At the trial at the last assizes at East Grinstead, Sussex, a verdict was found for the plaintiff, with £22 18*s.* 6*d.* damages, and 40*s.* costs, subject to the opinion of this court on the following case. William Tempest Mercer in his lifetime, and before the time of the execution of the bill of sale hereinafter mentioned, was indebted

to the plaintiff in the sum of £22 18*s.* 6*d.* for goods sold and delivered, which sum still remains due to the plaintiff. William Tempest Mercer, at the time of the execution of the said bill of sale, was likewise indebted to the defendant in the sum of £191 for money lent. On the 27th of March, 1786, Tempest Mercer offered to the defendant a bill of sale of his goods, household furniture, and stock in trade, in his house at Lewes, by way of security for the said debt. The defendant refused to accept of the same, unless he should be at liberty to enter upon the effects and sell them immediately after the expiration of fourteen days from the execution thereof, in case the money should not be sooner paid; to which Tempest Mercer agreed, and accordingly on the same day executed a bill of sale in the common form, by which Mercer bargained and sold to the defendant forever his household furniture, medicines, stock in trade [particularly specifying them], and *all and every other the goods, chattels, and effects whatsoever, in and about his dwelling-house and premises at Lewes.* Immediately upon the execution of the bill of sale, possession was delivered to the defendant in the manner described therein, viz. by the delivery of one cork-screw in the name of the whole, but in no other manner whatsoever. All the effects described in the bill of sale remained in the possession of William Tempest Mercer until the time of his death, which happened on the 7th of April, 1786. On the 8th of April, 1786, being before the expiration of fourteen days from the execution of the bill of sale, the defendant entered and took possession of the effects contained in the bill of sale, being then in the house of the deceased, and afterwards sold the same for £236 7*s.* 5*d.* William Tempest Mercer died intestate; and no letters of administration were taken out to the deceased by the defendant, or by any other person, before the commencement of this action. The question for the opinion of the court is, Whether the defendant be entitled to retain the produce of the said effects, or at least the value of £191, the consideration of the bill of sale; or whether the bill of sale be void as against the creditors of William Tempest Mercer; and the plaintiff in this action be entitled to recover his debt of £22 18*s.* 6*d.* against the defendant, as executor *de son tort?*

Partington, for the plaintiff.

Steele, for the defendant.

BULLER, J. This is an action brought by the plaintiff, who is a creditor of Mercer, against the defendant as executor. It does not appear by the case that any other goods than those mentioned in the bill of sale came to the defendant's hands. The bill of sale is dated on the 27th March 1786, and is a general bill of sale of all the defendant's household furniture and stock in trade. This bill of sale is to take effect immediately on the face of it: but there was an agreement between Mercer and the defendant, that the goods should not be sold till the expiration of fourteen days from the date of its execution; and no possession was actually taken till after the death of Mercer, which happened within the fourteen days; but there was a formal delivery of a

cork-screw in the name of the whole. On this case two questions arise: First, whether this bill of sale be void or not; and Secondly, if void, whether the defendant by having taken these goods under the bill of sale, made himself liable as an executor *de son tort*. The first question came before the court in the last term in the case of *Bamford* v. *Baron*, 2 T. R. 594, on a motion for a new trial from the Northern Circuit; and after hearing that case argued, we thought it right to take the opinion of all the judges upon it. Accordingly we consulted with all the judges, who are unanimously of opinion that unless possession *accompanies and follows* the deed, it is fraudulent and void; I lay stress upon the words "accompanies and follows," because I shall mention some cases where, though possession was not delivered at the time, the conveyance was not held to be fraudulent. There are many cases on this subject; from which it appears to me that the principle which I have stated never admitted of any serious doubt. So long ago as in the case in Bulstrode, the court held that an *absolute conveyance* or gift of a lease for years, unattended with possession, was fraudulent; but if the deed or conveyance be *conditional*, there the vendor's continuing in possession does not avoid it, because by the terms of the conveyance the vendee is not to have the possession till he has performed the condition. Now here the bill of sale was on the face of it absolute, and to take place immediately, and the possession was not delivered; and that case makes the distinction between deeds or bills of sale which are to take place immediately, and those which are to take place at some future time. For in the latter case the possession continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed; and such possession comes within the rule, as *accompanying and following* the deed. That case has been universally followed by all the cases since. One of the strongest is quoted in *Bucknal and Others* v. *Roiston*, Pr. in Chan. 287; there one Brewer, having shipped a cargo of goods, borrowed of the plaintiff £600 on bottomry, and at the same time made a bill of sale of the goods, and of the produce and advantage thereof, to the plaintiff. There Sir E. Northey cited a case, "where a man took out execution against another; by agreement between them the owner was to keep the possession of them upon certain terms, and afterwards another obtained judgment against the same man, and took the goods in execution; and it was held that he might, and that the first execution was fraudulent and void against any subsequent creditor, because there was no change of the possession, and so no alteration made of the property." And he said it had been ruled forty times in his experience at Guildhall, that, if a man sells goods, and still continue in possession as visible owner of them, such sale is fraudulent and void as to creditors, and that the law has been always so held. The Lord Chancellor held in the principal case that the trust of those goods appeared upon the very face of the bill of sale. That though they were sold to the plaintiffs, yet they trusted Brewer to negotiate and sell them

for their advantage, and Brewer's keeping possession of them was not to give a false credit to him as in other cases which had been cited, but for a particular purpose agreed upon at the time of the sale. So that the Chancellor in that case proceeded on the distinction which I have taken; he supported the deed, because the want of possession was consistent with it. This has been argued by the defendant's counsel as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance *per se* as makes the transaction fraudulent in point of law: that is the point which we have considered, and we are all of opinion that if there be nothing but the absolute conveyance without the possession, that in point of law is fraudulent. On the other hand there are cases, where the vendor has continued in possession, and the bill of sale has not been adjudged fraudulent, if the want of immediate possession be consistent with the deed. Such was the case of *Lord Cadogan* v. *Kennet*, Cowp. 432, because there the possession followed the deed. So also the case of *Haselinton and Another* v. *Gill and Another, Sheriff of Middlesex*, Tr. 24 Geo. 3, B. R. *post* 3, vol. 620 *n.*; there personal property, consisting (*inter alia*) of some cows, was settled on the marriage of the plaintiff's wife on certain trusts; and the court held that only those which were purchased after the marriage could be taken to satisfy the debts of the husband. The second question then is, Whether the defendant's having taken possession of these goods after Mercer's death, though under the bill of sale, will make him an executor *de son tort?* The two cases, which were cited by the plaintiff's counsel, are decisive of this point. In Bac. Abr. (2 Bac. Abr. 605) it is said "if a man make a deed of gift of his goods in his lifetime by covin to oust his creditors of their debts, yet after his death the vendee shall be charged for them." There too the possession was delivered to the vendee. To support this doctrine 13 H. 4, 4 b, Rol. Abr. 549, are both quoted. Then in what manner shall he be charged? He can only be charged as executor; because any intermeddling with the intestate's effects makes him so. The cases in Cro. Jac. and Yelv. cited at the bar prove it, and state the manner in which he shall be charged. There is also another strong case on this point in Dyer (Dy. 166 b). In short every intermeddling after the death of the party makes the person so intermeddling an executor *de son tort*.

GROSE, J., observed that it was unnecessary to repeat what had been said from the bench; but said that he was perfectly satisfied that the law was as had been stated.

Postea to the plaintiff.

HOLBIRD *v.* ANDERSON.

KING'S BENCH. 1793.

[*Reported* 5 *T. R.* 235.]

AT the trial of this action, before *Lord Kenyon*, against the defendants, sheriffs of London, for a false return to a writ of *fieri facias* against Charter, the case appeared to be this: in Easter Term 1791 Shepherd obtained a judgment against Charter, who brought a writ of error, and delayed execution until Easter Term 1792, when the judgment was affirmed in the Exchequer Chamber. On the 7th of May the costs in that suit were taxed; and on the same day Charter wrote a letter to Shepherd, requesting further time, which was refused. On the 8th of May, Charter, knowing Shepherd's intention to take out execution, which he was entitled to sue out that day, went to the plaintiff, Holbird, who was a creditor of his, informed him of his situation, and executed a warrant of attorney to confess a judgment, on which judgment was immediately entered up, and execution sued out and delivered to the sheriff two hours before Shepherd's execution reached the sheriff's office. The sheriff levied under Shepherd's writ, and returned *nulla bona* to the plaintiffs. On this evidence it was contended on the part of the defendants that the plaintiff was not entitled to recover, inasmuch as this was an undue preference given by Charter to the plaintiff for the purpose of defeating Shepherd's execution, and that the warrant of attorney given to the plaintiff was fraudulent and void by the Stat. 13 Eliz. *c.* 5. But Lord Kenyon being of opinion that this was not an undue preference, the plaintiff had a verdict; to set which aside

Gibbs on a former day obtained a rule to show cause.

Mingay and *Lawes* now showed cause.

Erskine and *Gibbs*, contra.

LORD KENYON, CH. J. There was no fraud in this case. The plaintiff was preferred by his debtor, Charter, not with a view of any benefit to the latter, but merely to secure the payment of a just debt to the former, in which I see no illegality or injustice. The words of the Stat. 13 Eliz. do not apply to this case, for this warrant of attorney was given on a good consideration; and the other words in the Act "*bona fide*" only apply to those cases where possession is not delivered, or where it is merely colorable. Of the former kind was *Twyne's Case*, where the vendor continued in possession; and of the latter was *Hodgson* v. *Newman*, where (as far as I recollect) the goods were not removed from the vendor's house, and his wife continued in possession of them. Nor can the case mentioned in *Cadogan* v. *Kennet* govern this; for there was a decree in the Court of Chancery, and a sequestration; which was an equitable charge on the defendant's property, and of which the purchaser had notice. No answer has been given to the

case put of the executor: it is not sufficient to say that these were not creditors in equal degree; for the rule concerning creditors of unequal degrees does not apply *inter vivos*. And in this case the judgment and simple contract creditor stood upon the same footing.

ASHHURST, J. The reason why executors are confined in their preference to those of equal degree, is, because otherwise it would amount to a *devastavit*. But *inter vivos* all are of the same degree; and any one may be preferred in this manner.

BULLER, J. In the case of *Hodgson* v. *Newman*, there was another ground for avoiding the bill of sale; it was not a bill of sale of certain goods only at a stated price, but a general bill of sale of all the grantor's effects, without any valuation of them.

Rule discharged.

MARTINDALE *v.* BOOTH.

KING'S BENCH. 1832.

[*Reported* 3 *B. & Ad.* 498.]

TRESPASS for taking away and converting furniture, goods, and chattels of the plaintiffs. Plea, Not guilty. At the trial before *Lord Tenterden*, C. J., at the Middlesex sittings after Trinity Term 1829, the jury found a verdict for the plaintiffs for £93 16*s.*, subject to the opinion of this court on the following case: —

Before the 8th of May 1828, one W. G. Priest, who kept the Peacock Tavern in Maiden Lane, Middlesex, was indebted to the plaintiffs, wine and spirit merchants, in £10 for wine and spirits. Priest having applied to them for a further supply of wine upon credit, and for a loan of money, the plaintiffs refused to give him any further credit, or to lend him any money unless he would give them satisfactory security. Priest then proposed to execute a bill of sale to them of the furniture and fixtures in the Peacock Tavern as such security, and the plaintiffs agreed to give him credit thereupon to the extent of £200. After Priest and the plaintiffs had agreed to give and accept such security, but before the bill of sale was actually executed, the plaintiffs, upon the faith of such agreement, advanced to Priest £30 in money, and to the amount of £60 in wine and spirits, and in two days afterwards, viz. the 8th of May 1828, in pursuance of the agreement, Priest executed and delivered to the plaintiffs a bill of sale, reciting that he, Priest, was indebted to the plaintiffs in the sum of £100 for money advanced and goods sold and delivered, and stating that, in consideration thereof, he granted, bargained, sold, and assigned unto the plaintiffs all the household goods, furniture, &c. in and about the premises called the Peacock Tavern, to hold to the proper use and behoof of the plaintiffs

forever, subject to the condition thereinafter contained: proviso, that if Priest should pay the said sum of £100 with lawful interest thereon by instalments, that is to say, £25 on the 7th of June then next, £25 on the 7th of May next, and £50, the residue thereof, on the 7th of November 1829, the deed should be void; but in default of payment of all or any of the said sums at the times appointed, then it should be lawful, although no advantage should have been taken of any previous default, for the plaintiffs forthwith to enter upon the premises, and take possession of the goods, furniture, &c., and absolutely sell and dispose of the same. There was a power reserved to the plaintiffs, during the continuance of the deed, to enter upon the premises and take an inventory; and also at any time after default as aforesaid to take and retain possession of the goods until they should deem it expedient to sell. Then followed a proviso, "that until default should be made in payment of all or any of the said sums, it should be lawful for Priest to retain and keep quiet possession of all and singular the said household goods," &c.

Before Priest commenced dealing with the plaintiffs, he had married the widow of one Higman, who formerly kept the Peacock Tavern, and who, at the time of his death, was indebted to Combe, Delafield, and Co. in the sum of £1100. His widow being executrix of his will, on on her marriage with Priest they both became possessed of Higman's effects; and Priest, by way of security for the said £1100, executed a warrant of attorney to Combe, Delafield, and Co. for that amount in November 1823. On the 1st of November 1828, Messrs. Combe, Delafield, and Co. caused judgment to be entered up on the warrant of attorney, and sued out a writ of *fi. fa.* directed to the defendants Booth and Copeland, then sheriff of Middlesex, who thereupon issued their warrant to Wilson, the other defendant, their officer, and he seized and took in execution the goods in question, being the furniture and effects in the Peacock Tavern. While the sheriff remained in possession, the plaintiffs came upon the premises, gave the defendants notice of the bill of sale, and required them to relinquish possession, which was refused, and the sheriff sold the goods. This case was now argued by

Archbold for the plaintiffs.

Comyn, contra.

Lord Tenterden, C. J. I am of opinion that the deed of sale was not absolutely void. Much has been said as to the secrecy attending that transfer, but the observation applies with equal force to the warrant of attorney, which was unknown to the plaintiffs, and which Combe and Co. forbore to act upon for so long a time. The consideration for the bill of sale was not only an antecedent debt, but a sum of money to be advanced by the plaintiffs to enable Priest to carry on his trade. The omission of the plaintiffs to take possession of the goods was perfectly consistent with the deed; for it was stipulated that Priest should continue in possession until default made in payment of all or any of

the instalments, and that on such default it should be lawful, although no advantage should have been taken of any previous default, for the plaintiffs to enter and take possession of the household goods and furniture. The possession by Priest, therefore, being consistent with the deed, and it having been given in consideration of money advanced to enable Priest to carry on his trade, I cannot say that it was absolutely void.

LITTLEDALE, J. I am of the same opinion. The cases show that continuance in possession of goods and chattels by a vendor after the execution of a bill of sale is a badge and evidence of fraud; but I think that, under the circumstances of this case, a jury would have negatived fraud. In *Jezeph* v. *Ingram*, 1 B. Moore, 189, Dallas, J. denies that *Edwards* v. *Harben*, 2 T. R. 587, lays down a general rule, that in transferring chattels the possession must accompany and follow the deed. There was in *Jezeph* v. *Ingram* a mixed possession; for the vendee superintended the management of the farm, and was occasionally present. That case, however, shows the opinion of the Court of Common Pleas to have been, that a change of possession is not in all instances necessary.

PARKE, J. I am of the same opinion. I think that the want of delivery of possession does not make a deed of sale of chattels absolutely void. The *dictum* of Buller, J., in *Edwards* v. *Harben* has not been generally considered, in subsequent cases, to have that import. The want of delivery is only evidence that the transfer was colorable. In *Benton* v. *Thornhill*, 2 Marshall, 427, it was said in argument, that want of possession was not only evidence of fraud, but constituted it; but Gibbs, C. J. dissented; and although the vendor there, after executing a bill of sale, was allowed to remain in possession, Gibbs, C. J., at the trial, left it to the jury to say, whether, under all the circumstances, the bill of sale were fraudulent or not. It is laid down in Sheppard's Touchstone, 224 (7th ed.), "that a bargain and sale may be made of goods and chattels without any delivery of any part of the things sold;" and, afterwards, in page 227, it is said "that the word *gift* is often applied to movable things, as trees, cattle, household stuff, &c., the property whereof may be altered as well by gift and delivery as by sale and grant, and this is, or may be, either by word or writing;" and in a note to this passage by the editor it is said, "that, by the civil law, a gift of goods is not good without delivery, yet in our law it is otherwise, when there is a deed: also in a *donatio mortis causa*, there must be a delivery." Then it is evident that the bill of sale, in this case, without delivery, conveyed the property in the household goods and chattels to the plaintiffs. It may be a question for a jury, whether, under the circumstances, a bill of sale of goods and chattels be fraudulent or not; and if there were any grounds for thinking that a jury would find fraud here, we might, this being a special case, infer it; but there is no ground whatever for saying that this bill of sale was fraudulent. It was given for a good consideration, for money advanced

to Priest to enable him to carry on his trade, and his continuance in possession was in terms provided for.

PATTESON, J. There is no sufficient authority for saying that the want of delivery of possession absolutely makes void a bill of sale of goods and chattels. It was held in *Martin* v. *Podger*, 2 Sir W. Bl. 701, that want of possession was a badge of fraud which ought to be left to the jury. Then, if it be a badge of fraud only, in order to ascertain whether a deed be fraudulent or not, all the circumstances must be taken into consideration. Here the possession was consistent with the deed, for the reason already given. The continuance of possession by the vendor is provided for by the deed, and the purchaser was not bound to enter for the first or the subsequent defaults in paying the instalments. That being so, the possession does not show fraud. The judgment of the court must be for the plaintiffs.

Judgment for the plaintiffs.[1]

HARLAND *v.* BINKS.

QUEEN'S BENCH. 1850.

[*Reported* 15 *Q. B.* 713.]

FEIGNED issue under the Interpleader Act, to try whether certain goods, seized by the sheriff of Yorkshire, under an execution at the suit of the defendant against one Morley, were or were not at the time of the seizure the goods of the plaintiff, who asserted the affirmative of the issue.

On the trial, before *Wightman*, J., at the Yorkshire Summer Assizes, 1849, it appeared that the attorney of Morley, in June or July, 1848, prepared a deed of assignment to the plaintiff of all Morley's goods in trust for the benefit of all such his creditors as should come in under the deed and execute it. The plaintiff and Morley both executed this deed some time in July. On 14th August the attorney, in the name of the plaintiff, took possession of the goods in question. On 23d August the sheriff seized the goods.

The plaintiff was not a creditor of Morley; and no creditor of Morley at any time executed the deed. Evidence, however, was given that, after the attorney had taken possession of the goods for the plaintiff, and before the seizure, one Cooke, who was a creditor of Morley, came to the attorney to demand an explanation; that he gave him an explanation, and that Cooke expressed himself satisfied, and went away, and took no subsequent steps to obtain payment of his debt, either under the assignment or independently of it. Evidence was also given that four other creditors at different times communicated with

[1] See 1 Sm. L. C. (8th Am. ed.) 31–94; 2 Kent, Com. 515–532.

the attorney; the communication between each of those four creditors and the attorney was to the same effect as that between him and Cooke. There was no evidence of any communication between any one of the creditors and another creditor, nor of any act done by any of them. The defendant's counsel at the trial maintained that the deed was fraudulent, and that, even if it was a *bona fide* transaction, it was voluntary and revocable by Morley, and therefore void as against his creditors. The jury found that the deed was not fraudulent, and that it was a *bona fide* assignment; and on that finding the learned judge directed a verdict for the plaintiff, subject to leave to enter a nonsuit, if the court should be of opinion, on the evidence, that the deed was voluntary. *Watson*, in the following term, obtained a rule *nisi* to enter a nonsuit.

Knowles, *Bliss* and *Lewis* now showed cause.

Watson and *Manisty*, contra.

Lord Campbell, C. J. I am of opinion that this rule must be discharged. The question has been fairly stated to be: Whether the relation of trustee and *cestui que trust* was established between the plaintiff and any of the creditors or not? If it was not, the deed was voluntary and revocable, according to *Garrard* v. *Lord Lauderdale*, 3 Sim. 1 (which case I think was well decided if that relation did not exist); but, if the relation is established, there is consideration for the deed, and it is no longer voluntary. Now what are the facts in the present case? Morley executed an assignment of the goods to the plaintiff, who took possession of them; and we must, at this stage of the proceeding, and after the finding of the jury, take it that this was a *bona fide* transaction, and really an assignment for the benefit of all his creditors who should come in and execute the deed. One of the creditors demands an explanation; and the plaintiff (by his attorney) explains, and, as we must now take it, fully and fairly explains, to him the whole transaction; and the creditor then says, "he is satisfied." By that he must have meant that he was satisfied that the deed should be proceeded with, and that he intended to come in and take the benefit of the assignment. Then I think the principle is very like that of *Williams* v. *Everett*, 14 East, 582, and other cases, in which it is held that money remitted to an agent to pay to a third person becomes money had and received to the third party's use, when there is privity established between him and the agent. Here I think the creditor must be considered to be assenting to the deed, so far as to create privity between him and the trustee.

Patteson, J. This transaction is not now impeached for want of honesty. The jury have found that the assignment was not fraudulent; and it must now be taken that it was a *bona fide* assignment for the benefit of all the creditors who should come in. But the question has been fairly stated to be, whether enough had taken place to create the relation of trustee and *cestui que trust* between the plaintiff and any of the creditors. That I consider here rather a question of fact than of

law. The plaintiff took possession of the goods on the 14th of August as assignee under the trust deed; and after that, and before the execution comes in, the plaintiff, or rather his attorney acting for him, tells five of the creditors, apart from each other, what has happened; and each of them expresses himself satisfied. After this had been done, I do not see how the plaintiff could depart from his position of trustee to those five; and, that being so, there is the relation of trustee and *cestui que trust* between the plaintiff and those creditors; and, if there is such a relation, the property which had vested in him by the assignment remains in him.

WIGHTMAN, J. In this case an assignment was made by the debtor to a trustee for the benefit of all his creditors who should come in and execute the deed, and the trustee (who was not himself a creditor) took actual possession on the 14th of August. Between that day and the coming in of the execution, which was on the 23d of August, communications were made by the attorney, acting for the trustee, to five of the creditors, stating what had been done; and each of these creditors separately expressed himself to be satisfied with what had been done. These creditors were not together, and did not act in concert; but the communications were separate communications to each, and the answers separate answers; and nothing was done by any of the creditors beyond those expressions. The question is, whether this assignment was void as against the execution creditor. It was contended, on the authority of *Garrard* v. *Lord Lauderdale*, that it was revocable by the debtor, and consequently void as against this creditor. But there no one of the creditors had in any degree assented to the deed; and the whole case turns upon that fact. In the present case there was an assent, not a formal assent in writing, but a verbal one, by several of the creditors; and the question is, whether that is sufficient to render the deed no longer revocable by the debtor or the trustee who acted under it by taking possession. The argument has been that, to render the deed valid, some creditor must have irrevocably bound himself to come in under the deed. If it were so, I should doubt whether enough had been done in the present case to establish the deed. But my judgment proceeds on the ground that it is not necessary to have the creditor bound to such an extent, but that it is sufficient if any creditors have been put in such a position that their rights may have been altered: when they have been put in such a position, I think that the trustee cannot retire, and that the deed is not revocable; at least not without the consent of those creditors whose rights may have been affected, and an option given to them to come in or decline doing so. The communications to the creditors by the trustee may have altered their position. They expressed themselves satisfied with the arrangement, and may in consequence have refrained from pursuing their legal remedies. This seems to be in accordance with the opinion of Vice-Chancellor Wigram in *Kirwan* v. *Daniel*, 5 Hare, 493, 500; and, taking this view of the case, the principle on

which *Williams* v. *Everett* was decided seems in many respects to be applicable: and I am of opinion that the assignment is valid, and that this rule must be discharged.

Rule discharged.[1]

TOWNSEND *v.* WESTACOTT.

CHANCERY. 1840.

[*Reported* 2 *Beav.* 340.]

THE MASTER OF THE ROLLS.[2] [LORD LANGDALE.] This bill is filed by the assignee of Westacott, an insolvent debtor, against the insolvent, his wife and her infant daughter, and against the trustees of the settlement and of some outstanding terms of years. The object of the bill is to set aside for fraud a voluntary conveyance, which was made by the insolvent on the 2d of April, 1830, to a trustee, for himself, for life, and afterwards in trust for Mrs. Pook and Maria Pook, her infant daughter. Mrs. Pook, being a stranger to the settlor, and no marriage being in contemplation at the time, though they afterwards married, this deed was a purely voluntary conveyance; and if it was a conveyance executed for fraudulent purposes it ought to be set aside; but if the transaction was honest, and without fraud, it ought not to be interfered with. In the first place, it is alleged on the part of the plaintiff, that this deed was executed entirely without consideration; that is admitted. In the next place it is said, that the settlor was largely indebted at the time; and of this there is strong evidence, which I shall presently notice. Being largely indebted he made this voluntary conveyance, and in less than three years afterwards he became absolutely insolvent. On these facts alone, provided they were properly put in issue and proved, I am of opinion that this conveyance ought to be set aside as fraudulent.

The state of the pleadings, however, is this, it is alleged by the bill that Westacott was, at the time, in insolvent circumstances, and indebted in a large amount to several persons, which he was unable to pay. The persons to whom he was so indebted are not specified; but it is stated, in a subsequent part of the bill, that having become insolvent, his debts in his schedule appeared to be £8,184, of which £5,600 were due on the 2d of April, 1830; and the plaintiff then "craves leave to refer to such schedule in aid of the suit, and intends to prove, if necessary, such existence as aforesaid of the said debts." With respect to Westacott himself, the schedule is a sufficient admission of the debts;

[1] See *Johns* v. *James*, 8 Ch. Div. 744 (1878).

[2] The opinion only is here given.

but of the other defendants one is a married woman, and the other an infant, who has put in a common infant's answer. These defendants have not had an opportunity of examining these debts. It would be very difficult to hold the infant or the married woman absolutely bound by the allegations as to the schedule, even for the purpose of putting them to prove that they are not to be affected by them; for everything as regards an infant or a married woman must be taken strictly. I can have no doubt that the bill was put in this form with the very proper intention of saving expense; but this upright intention is sometimes defeated without the least fault of those who defend the case; and the advisers of the infant and married woman are quite right in seeing that these debts are strictly proved against them.

There has been a little exaggeration in the arguments on both sides as to the principle on which the court acts in such cases as these: on one side it has been assumed that the existence of any debts at the time of the execution of the deed would be such evidence of a fraudulent intention as to induce the court to set aside a voluntary conveyance, and oblige the court to do so under the Statute of Elizabeth. I cannot think the real and just construction of the Statute warrants that proposition, because there is scarcely any man who can avoid being indebted to some amount: he may intend to pay every debt as soon as it is contracted, and constantly use his best endeavors, and have ample means to do so, and yet may be frequently, if not always, indebted in some small sum: there may be a withholding of claims, contrary to his intention, by which he is kept indebted in spite of himself; it would be idle to allege this as the least foundation for assuming fraud or any bad intention. On the other hand, it is said that something amounting to insolvency must be proved to set aside a voluntary conveyance: this too, is inconsistent with the principle of the Act, and with the judgments of the most eminent judges. The evidence as to the value of Westacott's property when he executed the settlement I cannot rely on: it is brought forward many years after the witnesses had known it, and they speak to the value of the property without taking into consideration any charges that might be upon it; and I am not in a situation of knowing whether there were any charges upon it.

Under the circumstances in which this case has been brought before me, if the married woman and infant had had the opportunity of meeting the evidence as to the existence of the debts at the time of the settlement, I should have been bound to make the decree which is asked for in the first instance. I cannot, however, under the circumstances, make such a decree as is asked; but the plaintiff is, I think, entitled, under the alternative prayer of his bill, to try the validity of the settlement by an action at law; but if there are any difficulties which cannot be removed, I will direct a reference to the master.[1]

[1] Cf. *Townshend* v. *Windham*, 2 Ves. Sr. 1, 10, 11 (1750); *Lusk* v. *Wilkinson*, 5 Ves. 384 (1800).—Ed.

The case was subsequently mentioned, when it was referred to the master to inquire what debts were owing by Westacott at the date of the deed, and at the time of his insolvency.

Mr. Pemberton and *Mr. Chandless*, for the plaintiff.
Mr. Richards and *Mr. Elderton*, contra.
Mr. Jemmett, for the trustees.

JENKYN *v.* VAUGHAN.

CHANCERY. 1856.

[*Reported* 3 *Drew.* 419.]

THIS was a bill to set aside certain indentures of post-nuptial settlement made by George Concannen, as being fraudulent and void against creditors.

The bill was filed by simple contract creditors of Concannen against the executrix of his will; against the sole acting trustee of one of the deeds; and against the widow; the latter being the real and substantial defendant.

In 1834 Concannen had insured his life for £1,000; in 1833 for £800; and in 1832 for £300.

In 1834 he assigned the £800 policy to Gillson for securing an advance.

In 1842 he assigned the three policies to trustees to secure certain benefits to his wife, reserving to himself an absolute power of revocation.

In 1844 he made his will, by which he gave certain property, not including the policies, to his wife; and he gave his residue to Fanny Vaughan, whom he made his executrix.

In 1845 he revoked the deed of 1842, and reassigned the policies to trustees (one of whom disclaimed, leaving W. D. Lewis, a defendant, the sole trustee) on trusts for his wife, again reserving an absolute power of revocation.

He kept the deed in his own hands, and paid the premiums on the policies during his life; and died in 1852, largely indebted.

The debts of the plaintiff arose in 1852.

It was admitted that at the dates of the settlements Concannen was indebted in considerable amounts, besides the mortgage debt secured by the deed of 1834; and there was one in particular to a person named Bouverie, the state of which is noticed in the judgment. But on the evidence it was not clear whether all these previous debts had been liquidated at the dates of the settlements, or whether some of them did not still subsist at the time when the plaintiff's debt accrued.

The principal question was, whether, under these circumstances, the plaintiff could sustain a bill to set aside the voluntary settlements?

Mr. Baily and *Mr. W. W. Cooper,* for the plaintiff.

Mr. Glasse and *Mr. Buxton*, for the trustee, took no part in the argument.

Mr. Dickinson, for the widow.

THE VICE-CHANCELLOR. [SIR R. T. KINDERSLEY.] The first question is, whether, in the case of a voluntary settlement, a creditor, whose debt accrued subsequently to the execution of the deed, can file a bill for the purpose of setting it aside. Now it is not in dispute that a subsequent creditor is entitled to participate, if the instrument is set aside by any creditor; and I am not aware that in that case there is any distinction between the two classes of creditors, those who were so before, and those who became so after the deed. I believe they all participate *pro rata.* It is clear therefore that a subsequent creditor has an equity to some extent, viz., a right to participate in the division of the property if the settlement is set aside.

Prima facie then, if a subsequent creditor has an equity, one would suppose there could be no reason to prevent him from filing a bill to enforce it; it is indeed possible that there may be cases where a person who has an equity to participate has not the right to file a bill; but, *prima facie*, when a party has an equity, he may file a bill to enforce it.

Now the Statute of 13 Eliz. cap. 5, which is referred to in this case, avoids deeds which are made with intent to defraud or delay creditors. The instrument must be made with the *intent to defraud* creditors. Now, no doubt an instrument may be executed for the purpose of defrauding subsequent creditors; and, with regard to creditors being so at the time, it is established that it is not necessary to show from anything actually said or done by the party, that he had the express design by the deed to defeat creditors; but if he includes in it property to such an amount that, having regard to the state of his property, and to the amount of his liabilities, its effect might probably be to delay or defeat creditors, if the court is satisfied of that, the deed is within the meaning of the Statute.

In cases where a subsequent creditor files a bill, it occurs to me that much may depend on this (supposing there is no evidence of anything to show the fraudulent intention but the fact of the settlor being indebted to some extent), — whether, at the time of filing the bill, any of the debts remain due which were due when the deed was executed. In such a case, as any of the prior creditors might file a bill, it appears to me that a subsequent creditor might do so too; but if at the time of filing the bill no debt due at the execution of the deed remains due, the distinction may be that then a subsequent creditor could not file a bill, unless there were some other ground than the settlor being indebted at the date of the deed to infer an intention to defraud creditors. How-

ever, I do not find any such rule laid down, and I shall not take upon myself to lay it down positively. But if a subsequent creditor files a bill, and you can show that the person who executed the deed, though indebted at the time he made it, has since paid every debt, it is very difficult to say that he executed the settlement with an intention to defeat or delay creditors, since his subsequent payment shows that he had not such an intention. But it appears to me, in the absence of authority to the contrary, that a subsequent creditor may file a bill, if any debt due at the date of the deed remains due at the time of filing the bill.

When we look at the authorities, we find that in two or three cases, where the question has been raised as to the plaintiff's right to file a bill, being a subsequent creditor, and debts antecedent have been shown still to subsist, the court, having its attention drawn to that, has made a decree in favor of the creditor.

In this case I find sufficient *prima facie* evidence to lead me to the conclusion that something still remains due in respect of the debts which existed at the date of the deed; there is sufficient *prima facie* evidence to justify me in directing an inquiry.

I put aside the mortgage debt secured on the policies of insurance. The policies, so far as the mortgage debt extended, were the property of the mortgagee; and what was retained and settled was only that which remained after satisfaction of the mortgage debt; I put that aside.

But, as to the debt to Bouverie, there is sufficient evidence to induce me to direct an inquiry. The evidence on that debt goes to this, — that to the best of the knowledge and belief of the witness the debt consists of a balance of moneys advanced by Bouverie to Concannen, some part of which at least was antecedent to the date of the settlement.

It appears to me that that justifies inquiry; and there are besides various claims, which may turn out to establish debts due at the date of the deed remaining unpaid.

But, in addition to the circumstances arising out of this debt and the claims, it appears that the property which Concannen left is extremely trivial; and at his death it is proved that he was indebted to the extent of many thousands; so that it is not unnatural to suppose that there are still debts unsatisfied which were due at the date of the deed.

As to the intention to delay creditors, it is not immaterial that both deeds are made with general powers of revocation, which enabled the settlor to deal with the property, and that he retained possession of the deeds till the time of his death; and it does not appear that any notice was given to any of the insurance offices. All these circumstances are not, it is true, conclusive of fraudulent intention; but they have an important bearing on the question of fraudulent or improper design.

I think, therefore, that I ought to direct inquiries, which will be in the usual form, the form adopted in the cases cited.

FREEMAN *v.* POPE.

CHANCERY. 1870.

[*Reported L. R. 5 Ch.* 538.]

THIS was an appeal by the defendant Pope from a decree of *Vice-Chancellor James*, setting aside a voluntary settlement, dated the 3d of March, 1863, by which the Rev. J. Custance assigned to trustees for the benefit of Julia Pope (then Julia Thrift) a policy of insurance for £1000 (effected by him in 1845 on his own life), and covenanted to pay the premiums. It appeared that he had previously settled this policy upon her in 1853, reserving a power of revocation, which he exercised in 1861, in order that he might receive a bonus.

At the time when the settlement now impeached was made, the settlor held two livings producing a net income of £815, and he was entitled to a Government life-annuity of a little more than £180, and to a copyhold cottage which he on the same day covenanted to surrender to Mrs. Walpole, the mother of Julia Pope, for £50. He had no other property except his furniture, and he was being pressed by his creditors. Among other debts, he owed £489 to Messrs. Gurney, his bankers at Norwich, and £7 8*s.* 6*d.* to a postmaster. On the same 3d of March, 1863, he borrowed from Mrs. Walpole £350, for which he gave her a bill of sale of his furniture. Mrs. Walpole was privy to, and one of the trustees of, the settlement. At the same time he made an arrangement with his bankers that his solicitor, Mr. Copeman, should receive certain income from the benefices, and pay out of it £50 each half-year towards discharge of the balance. The banking account at Norwich was to remain a dead account, and to be discharged, with interest, by the above instalments. A new account was to be opened with the Aylsham branch of the same bank, and Copeman was to pay the residue of the income (after deducting the £50) to this new account, which was to be an ordinary current banking account.

At the testator's death, in April, 1868, the balance of £489 due to the bankers had been reduced to £117 by means of the annual instalments of £50. The Aylsham account showed no balance on either side. The postmaster's debt of £7 8*s.* 6*d.*, and Mrs. Walpole's £350, with an arrear of interest, remained unpaid. The other debts due at the date of the settlement had been paid. The settlor, however, owed many debts subsequently contracted, and there were no assets whatever to pay them; the furniture having been sold under a subsequent bill of sale, to which Mrs. Walpole had agreed to postpone her security.

The plaintiff, a tradesman who had supplied goods to the settlor after the date of the settlement, filed his bill for administration of the

settlor's estate, and to set aside the settlement, to the benefit of which the defendant Pope had become entitled under an appointment by Julia Pope.

Vice-Chancellor James made a decree for setting aside the settlement, from which Pope appealed.

Mr. Morgan, Q. C., and *Mr. H. A. Giffard*, for the appellant

Mr. Kay, Q. C., and *Mr. Cozens-Hardy*, for the plaintiff, were not called upon.

Lord Hatherley, L. C. The principle on which the Statute of 13 Eliz. c. 5 proceeds is this, that persons must be just before they are generous, and that debts must be paid before gifts can be made.

The difficulty the Vice-Chancellor seems to have felt in this case was, that if he, as a special juryman, had been asked whether there was actually any intention on the part of the settlor in this case to defeat, hinder, or delay his creditors, he should have come to the conclusion that he had no such intention. With great deference to the view of the Vice-Chancellor, and with all the respect which I most unfeignedly entertain for his judgment, it appears to me that this does not put the question exactly on the right ground; for it would never be left to a special jury to find, *simpliciter*, whether the settlor intended to defeat, hinder, or delay his creditors, without a direction from the judge that if the necessary effect of the instrument was to defeat, hinder, or delay the creditors, that necessary effect was to be considered as evidencing an intention to do so. A jury would undoubtedly be so directed, lest they should fall into the error of speculating as to what was actually passing in the mind of the settlor, which can hardly ever be satisfactorily ascertained, instead of judging of his intention by the necessary consequences of his act, which consequences can always be estimated from the facts of the case. Of course there may be cases — of which *Spirett* v. *Willows*, 3 D. J. & S. 293, is an instance — in which there is direct and positive evidence of an intention to defraud, independently of the consequences which may have followed, or which might have been expected to follow, from the act. In *Spirett* v. *Willows* the settlor, being solvent at the time, but having contracted a considerable debt, which would fall due in the course of a few weeks, made a voluntary settlement by which he withdrew a large portion of his property from the payment of debts, after which he collected the rest of his assets and (apparently in the most reckless and profligate manner) spent them, thus depriving the expectant creditor of the means of being paid. In that case there was clear and plain evidence of an actual intention to defeat creditors. But it is established by the authorities that in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the judge to direct the jury that they

must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the Statute.

The circumstances of the present case are these: The settlor was pressed by his creditors on the 3d of March, 1863. He was a clergyman with a very good income, but a life income only. He had a life annuity of between £180 and £190 a year, and besides that he had an income from his benefice, — his income from the two sources amounting to about £1000 a year. But at the same time his creditors were pressing him, and he had to borrow from Mrs. Walpole, who lived with him as his housekeeper, a sum of £350 wherewith to pay the pressing creditors. That accordingly was done, and he handed over to her as security the only property he had in the world beyond his life income and the policy which is now in question; namely, his furniture, and a copyhold of trifling value. It is said, however, that the value of the furniture exceeded (and I will take it to be so) by about £200 the value of the debt which was secured to Mrs. Walpole. That debt may be put out of consideration, not only on that account, but because Mrs. Walpole, being herself a trustee of the settlement which is impeached, cannot be heard to complain of that settlement. But he also owed at the time of this pressure a debt of £339 to his bankers at Norwich, and he required, for the purpose of clearing the pressing demands upon him, not only the sum which he borrowed from Mrs. Walpole, but an additional sum of £150, which sum the bankers agreed to furnish, making their debt altogether, at the date of the execution of this settlement, a debt of £489. They made with him an arrangement (which probably was intended, in a great measure, as a friendly act towards a gentleman who was seventy-three years of age, and the duration of whose life, therefore, could not be expected to be very long), that they would for the present (for it cannot be held to be more than a present arrangement) suspend the proceedings, which, it appears, they were contemplating, upon his allowing his solicitor to receive part of his income, pay a £100 a year towards liquidating the £489 (which was to be carried to what is called a "dead account"), and pay the residue into their branch bank at Aylsham, to an account upon which the settlor might draw. That arrangement was made, but there was no bargain on the part of the bankers that they would not sue at any time they thought fit; and, on the other hand, they had nothing in the shape of security for the payment of their debt, for they had not taken out sequestration, and there could be nothing in the shape of a charge upon the living except through the medium of a sequestration. When the settlor had made the voluntary assignment of the policy, he stood in this position, that he had literally nothing wherewithal to pay or to give security for the debt of £489, except the surplus value of the furniture, which must be taken to be worth about £200, and he was clearly and completely insolvent the moment he had executed the settlement, even if we assume that some portion of his tithes and of the annuity was due to him. It appears that a payment of the tithes was made in

January, and we cannot suppose that there was more owing to him than the £200 which was paid in May, two months after the date of the deed; and if we add to that £200 as the surplus value of the furniture, and add something for an apportioned part of the annuity, the whole put together would not meet the £489. He, in truth, was at that time insolvent; and there I put it more favorably than I ought to put it, because he could not at once put his hands upon that sum, so as to apply it towards satisfying the debt, at any time between March and May. The case, therefore, is one of those where an intention to delay creditors is to be assumed from the act.

The Vice-Chancellor seems to have felt himself very much pressed by the case of *Spirett* v. *Willows* and the *dicta* of Lord Westbury in that case. The first of these *dicta* is: "If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement." The Vice-Chancellor seems to have thought himself bound by this expression of opinion, and to have set aside the settlement upon that ground alone. It is clear, however, that this expression of opinion on the part of the Lord Chancellor was by no means necessary for the decision of the case before him, where the settlor was guilty of a plain and manifest fraud. It is expressed in very large terms, probably too large; but, at all events, it is unnecessary to resort to it in the present case. It seems to me that the difficulty felt by the Vice-Chancellor arose from his thinking that it was necessary to prove an actual intention to delay creditors, where the facts are such as to show that the necessary consequence of what was done was to delay them. If we had to decide the question of actual intention, probably we might conclude that the settlor, when he made the settlement, was not thinking about his creditors at all, but was only thinking of the lady whom he wished to benefit; and that his whole mind being given up to considerations of generosity and kindness towards her, he forgot that his creditors had higher claims upon him, and he provided for her without providing for them. It makes no difference that Messrs. Gurney, the bankers, seem to have been willing to forego the immediate payment of their debt; the question is, whether they could not within a month or less after the execution of the settlement, if they had been so minded, have called in the debt and overturned the settlement? Beyond all doubt they could, on the ground that it did not leave sufficient property to pay their debt; and this being so, we are not to speculate about what was actually passing in his mind. I am quite willing to believe that he had no deliberate intention of depriving his creditors of a fund to which they were entitled, but he did an act which, in point of fact, withdrew that fund from them, and dealt with it by way of bounty. That being so, I come to the conclusion that the decree of the learned Vice-Chancellor is right.

Then as to the costs. I think that the expense of separating them would come to more than the mere costs of administration. It was urged that this is an administration suit, as well as a suit to set aside the deed, and that, therefore, the respondent ought not to have all the costs; but the costs of an administration summons would be trifling, and the costs of the suit are in reality those which have been incurred by the question as to the validity of the deed. The appeal must, therefore, be dismissed with costs.

Sir G. M. Giffard, L. J. In this case I quite agree with the Vice-Chancellor in thinking that if the propositions laid down in *Spirett* v. *Willows* are taken as abstract propositions, they go too far and beyond what the law is; but if they are taken in connection with the facts of that case, then undoubtedly there is abundantly enough to support the decision, for there was a voluntary settlement by a man who, at its date, was solvent, but immediately afterwards realized the rest of his property and denuded himself of everything. Of course the irresistible conclusion from that was, that the voluntary settlement was intended to defeat the subsequent creditors. That being so, I do not think that the Vice-Chancellor need have felt any difficulty about the case of *Spirett* v. *Willows*, but he seems to have considered, that in order to defeat a voluntary settlement there must be proof of an actual and express intent to defeat creditors. That, however, is not so. There is one class of cases, no doubt, in which an actual and express intent is necessary to be proved,— that is, in such cases as *Holmes* v. *Penney*, 3 K. & J. 90, and *Lloyd* v. *Attwood*, 3 De G. & J. 614, where the instruments sought to be set aside were founded on valuable consideration; but where the settlement is voluntary, then the intent may be inferred in a variety of ways. For instance, if, after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settlor's debts, then the law infers intent, and it would be the duty of a judge, in leaving the case to the jury, to tell the jury that they must presume that that was the intent. Again, if at the date of the settlement, the person making the settlement was not in a position actually to pay his creditors, the law would infer that he intended, by making the voluntary settlement, to defeat and delay them.

Now in this case, at the date of the settlement, Mr. Custance was really insolvent; and if at the date of the settlement the bankers had insisted on payment, and had issued execution, they could not have got a present payment unless they had resorted to that particular policy. That being so, it seems to me that the facts of this case bring the matter entirely within all the decided cases, and it is enough to say that at the date of this settlement Mr. Custance was not in a position to make any voluntary settlement whatever.

That being so, the appeal must be dismissed, and dismissed with costs, as I can see no reason for saying that the decree was not right in giving the whole costs of the suit. There was, previously to this

case, a decision by Vice-Chancellor Kindersley (*Jenkyns* v. *Vaughan*, 3 Drew. 419), laying down the rule that where a subsequent creditor institutes a suit and proves the existence of a debt antecedent to the settlement, he can maintain a suit such as this, and therefore it is not a new case. There can be no reason for doubting the correctness of that decision, either in point of principle or justice.[1]

MACKAY *v.* DOUGLAS.

CHANCERY. 1872.

[*Reported L. R.* 14 *Eq.* 106.]

SIR R. MALINS, V. C.[2] This case raises as important a question, probably, on this branch of the law as has ever been brought before the court.

[1] "The plaintiff sues as a creditor to set aside a voluntary settlement or deed of gift made by the defendant his debtor. The plaintiff's debt was contracted before the time of making the settlement. He has since recovered judgment at law, and the debtor has become bankrupt.

"The plaintiff complains in the words of the Statute of Elizabeth that his judgment and execution are hindered, delayed and defrauded by the conveyance of the goods and chattels of his debtor made by this voluntary settlement.

"The defence is, that at the time of making the settlement the debtor reserved and had property enough to pay the plaintiff and all his other creditors in full, and that the settlement, therefore, is not fraudulent, because the debtor remained solvent after he had made it.

"There is some inconsistency in the decided cases on the subject of conveyances in fraud of creditors, but I think the following conclusions are well founded.

"If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement.

"But if a voluntary settlement or deed of gift be impeached by subsequent creditors whose debts had not been contracted at the date of the settlement, then it is necessary to show either that the settlor made the settlement with express intent 'to delay, hinder or defraud creditors,' or that after the settlement the settlor had no sufficient means or reasonable expectation of being able to pay his then existing debts, that is to say, was reduced to a state of insolvency; in which case the law infers that the settlement was made with intent to delay, hinder or defraud creditors, and is therefore fraudulent and void.

"It is obvious that the fact of a voluntary settlor retaining money enough to pay the debts which he owes at the time of making the settlement, but not actually paying them, cannot give a different character to the settlement or take it out of the Statute. It still remains a voluntary alienation or deed of gift, whereby in the event the remedies of creditors are delayed, hindered or defrauded.

"I am therefore of opinion that this settlement is void as against the plaintiff." —*Per* LORD WESTBURY, C., in *Spirett* v. *Willows*, 3 De G. J. & S. 293, 302, 303 (1864). *Accord.* is *Reade* v. *Livingston*, 3 Johns. Ch. 481 (1818).

[2] The opinion only is here given.

The circumstances are very simple. Mr. Douglas had been for some years a clerk in various mercantile houses, and in the autumn of 1863 was a clerk to a firm carrying on business in London, Liverpool, and Calcutta, under the names of William Grant & Co., James Smith & Co., and Grant, Smith, & Co. His salary, which was for some time £200 a year, had latterly been raised to £500.

In the latter part of the year 1863 his employers were engaged on a very large scale in speculations in jute, which is an article subject to very considerable variations in price. These speculations, which I think were of a reckless and unjustifiable character, were to some extent carried on by the aid of Mr. Douglas, and it is not attempted to be denied that he was to some extent interested in the result of them. The plaintiffs say that he was interested jointly as a partner, and certainly there is a passage in Mr. Smith's evidence which seems to sustain that view.

But, though I do not intend to rest my conclusion on any such grounds, it is not unimportant to observe that for several months before the settlement in question was made he was certainly, either on his own account or on account of the firm whose servant he was, engaged in these reckless speculations in jute. In this state of things the firm were carrying on business in London and Liverpool, and in connection with some other persons in India. Of the English partners it is only necessary to refer to Mr. Smith and Mr. Grant. Proposals had been made for the retirement of Mr. Grant, and this business was to be carried on by Mr. Smith alone, or with such persons as he should think proper to take into partnership with him. It is perfectly plain, for it is shown under the hand of Mr. Douglas himself, that he entertained the expectation of going into partnership with Mr. Smith, his employer, if Mr. Grant retired. That is very distinctly shown in a letter so early as the 11th of September, 1863, written by Mr. Douglas to Mr. James Smith. It gives the particulars of some purchases of jute and so forth, and then he says: —

"I am much obliged for the inquiry in the latter part of your note. Grant writes me that he will be in town on Wednesday, when he also expects to see you here, and I will then speak to you fully on the subject. If Grant retires altogether from Calcutta business I would be very glad indeed if you could come to an arrangement with me here. But I have still my doubts whether Grant will retire; only there has been so much lately of deciding one way, and then deciding in another, that I had made up my mind to wait quietly till something was actually agreed upon."

So matters went on, and in October, the very next month, Mr. Douglas, who in the course of his clerkship had amassed a sum of money which he says amounted to about £3,000 or £4,000, but which I cannot make out amounted to so much, entered into this transaction. He was a married man, having at the time no child, but in the progress of this business the first child of the marriage was born, and on the 8th of

October, 1863, while it appears that he certainly had it in his mind as a probable event that he would go into partnership with his employer Mr. Smith, he entered into a contract to purchase a leasehold house, which is the subject of this suit. The contract was on the 30th of October, and the purchase was completed by an assignment to himself on the 2nd of November. All was right so far, and nobody can complain of that part of the transaction. But while he was carrying on the negotiation for the partnership, on the 19th of January, he saw his solicitor, and talked of making, but did not give him positive instructions to make, a settlement of the leasehold house, which was worth from £1,500 to £1,800. On the 12th of February, 1864, he gave final instructions to his solicitor to prepare a voluntary settlement of that property, and in pursuance of the instructions the settlement was prepared and duly executed on the 24th of February, 1864.

Now the trusts of that settlement were for Mrs. Douglas for her life to her separate use in the usual way, with remainder to himself if he should survive her for life, or until he should become bankrupt or insolvent. Then there were the usual trusts for children, and in default of children, to himself absolutely. On the 8th of April following (forty-four days, I think, is the precise time, but it may be called six weeks afterwards), he entered into partnership with Mr. Smith. The partnership, in point of profits, was to commence from the 1st of May, that is, Mr. Grant's contract was to go out on the 30th of April, and the arrangement between Smith and Douglas was, that he should succeed on the next day. Accordingly the business begins actively on the 1st of May, 1864, that is, rather more than two months from the time when the voluntary settlement was executed; but it must, for the purpose for which I look at it, be considered as commencing when the articles of partnership were signed.

Mr. Douglas went to India, and his partner, Mr. Smith, remained at home, and whether with the connivance, or approbation, or knowledge of Douglas, it seems somewhat uncertain, but it is certain that the business was so conducted that the firm was in difficulties so early as the month of November in the same year. They were borrowing and were embarrassed; the embarrassments so much increased that in the following month of March they failed for the sum of £347,000, and up to this time their dividend has been fourpence in the pound, and I am told that there is a possibility that there may be another penny, so that probably they will not pay sixpence in the pound.

Now to all these proceedings, however innocent Mr. Douglas may have been while in India, I must regard him as a party, because one partner is liable for the misfeasance of another. One of the most fruitful sources of ruin to men of the world is the recklessness or want of principle of partners, and it is one of the perils to which every man exposes himself who enters into partnership with another.

Now this question seems to me to raise a most important point. Can a man who contemplates trade, or who, in point of fact, whether

he contemplates it at the time or very shortly afterwards, enters into trade, and thereby incurs liabilities which end in a disastrous state of affairs, make a voluntary settlement which shall be good against the creditors who become so in the course of his trade? I am not aware of any case upon the exact point, and none was cited, although almost all the cases which have occurred upon the subject were mentioned. But is the Statute of Elizabeth so very short in its effect that it will not cover a case where a man on the very eve of entering into trade takes the bulk of his property and puts it into a voluntary settlement and becomes insolvent a few months afterwards? Is it to be said that such a settlement cannot be reached by any principle of law? I think not. Lord Langdale considered the question very fully in *Townsend* v. *Westacott*, 2 Beav. 340; 4 Beav. 58, where the insolvency did not arise until three years after the voluntary settlement was executed; and he there laid down the rule that the burden of proving the position of the parties, and that they were in a position to make a voluntary settlement, was shifted and thrown upon the man who executed the voluntary settlement; and last year I also considered the same subject very fully in *Crossley* v. *Elworthy*, Law Rep. 12 Eq. 158, where Mr. Elworthy, who possessed a very considerable amount of property, considered himself solvent, made a settlement of a large amount, and was in difficulties nine months afterwards. I thought, following the previous decisions, that in that case the whole burden was thrown upon him of showing that he was not only solvent but in a situation to justify his making a voluntary settlement; I say, in the same way, that Mr. Douglas, having become bankrupt or insolvent within seven months after the execution of the settlement, has the burden cast upon him of showing, not merely that he was solvent, but that he was in a situation which justified him in making a voluntary settlement of the great bulk of his property. I carried the principle somewhat further perhaps in *Crossley* v. *Elworthy* than the previous decisions, because I did not treat it as turning on the mere question of solvency or insolvency, but I said, Law Rep. 12 Eq. 168, "If a man does under such circumstances" — that is, when it is doubtful whether he is in a solvent condition, and, if so, uncertain whether he is likely to remain so — "make a settlement, it seems to me in the highest degree reasonable that upon him should be thrown the burden of proving that he was in a condition to make it when it was executed." [His Honor then referred shortly to the facts of the present case, and continued: —] I am satisfied from the evidence that Mr. Douglas contemplated a partnership, and that the probability of such a partnership was the inducement to him to make the settlement. He had very likely never heard of the Statute of Elizabeth; but taking a common business-like view of the matter, and considering the rather reckless nature of the business into which he was entering, he wished to make a provision out of the leasehold house which he had bought for his wife and any children he might have. I cannot hesitate to come to the conclusion that the inducement to him to

make this settlement on the very eve, as I consider it, of his going into business was to protect this property from any risk.

Many cases have been cited. It is not at all necessary to show that a man had any fraudulent intent in making a settlement as the law is now settled. It is very true that some of the old authorities cited by Mr. Fischer, particularly *Stileman* v. *Ashdown*, 2 Atk. 477, and many of the decisions long after that, proceeded upon the assumption that the settlement could not be set aside unless there was an intention to defraud, because the words of the Statute are, "with intent to defraud, defeat, or delay creditors." But that has been long got rid of, and it is not necessary now to show that. The Statute speaks of cases where the creditors "are, shall, or might be in any wise disturbed, hindered, delayed, or defrauded," and it is not necessary to show an intention to do that, because if the settlement must have that effect the court presumes the intention and will attribute it to the settlor. That is distinctly laid down by the present Lord Chancellor, on appeal from Vice-Chancellor James, in *Freeman* v. *Pope*, Law Rep. 9 Eq. 206. I acted upon that principle in *Crossley* v. *Elworthy*, where I expressly gave Mr. Elworthy the benefit of my opinion, that he did not intend to commit a fraud, but as the settlement had the effect of defeating or delaying his creditors I attributed the fraudulent intention to him within the meaning of the Statute, and set the settlement aside. So I daresay that Mr. Douglas had no fraudulent intention, according to his view, in making the settlement, and that he thought it a prudent thing to protect his wife and children. But in doing that he has, within the meaning of this Statute, committed a fraudulent act, because, going into trade, he was taking away the only property which would be available for his creditors.

This happens to be a small amount of property with reference to the debts incurred, and with reference to the position of Mr. Douglas when the settlement was executed. But if I were now to decide against the plaintiffs my decision would be applicable to any case. Suppose then the case of a man with a large fortune, and having a fancy (and I have known such cases) for going into trade. He says: "I am going into trade; I believe I may make a great deal of money by it, but nobody knows what may happen. Therefore, I will make this large fortune safe by settling it on my wife and children absolutely." The law is perfectly settled that if a man is solvent at the time, and after the time of taking away the property which is put into the settlement he remains solvent, and does not at the time contemplate doing anything which could lead to insolvency, that settlement will be good. One of the cases cited, *Holloway* v. *Millard*, 1 Madd. 414, illustrates that proposition. There a woman had £42,000, and she settled £36,000 on her illegitimate child. There remained £6,000 after taking away the £36,000. She was perfectly solvent, and there was no evidence whatever that she contemplated doing anything in the world that would lead to insolvency. But some years afterwards she became insolvent, and she died insol-

vent, and the settlement was held to be perfectly good. So, in the present case, if Mr. Douglas had neither gone into nor contemplated going into trade at the time, but some years afterwards, by a totally new arrangement, made up his mind to do so, I should have had no hesitation in coming to the conclusion that his subsequent insolvency could have had no effect in producing invalidity of the settlement which he had made upon his wife and family.

The only rule I have found laid down on the subject that commends itself to my judgment, as I think it must commend itself to the judgment of all right-thinking men, is laid down in a very few words by Lord Hardwicke in *Stileman* v. *Ashdown*. The father there had made a purchase in the name of his son, which was a voluntary settlement, on the principle that if a father buys property in the name of his child it is an advancement to or a settlement on the child. Still the father did acts which were likely to lead to debt, and therefore, on that ground, Lord Hardwicke set aside the settlement or provision made by the purchase of a property in the name of the child. Now, what is the meaning of this passage? "It is not necessary that a man should actually be indebted at the time he enters into a voluntary settlement to make it fraudulent; for if a man does it with a view to his being indebted at a future time, it is equally fraudulent." Mr. Bristowe pressed upon me that it meant he contemplated getting into debt. But I do not read it so. I read it thus: that if a man does it with a view of being indebted at a future time, that is, with a view to a state of things in which he may become indebted, that makes it fraudulent, just as if he were indebted at the time. In the present case Mr. Douglas made the settlement, as I am perfectly satisfied, with the view that he was going into partnership in which he might become bankrupt or insolvent and utterly ruined; and therefore he did it with the view that he might be indebted, and the settlement in my opinion was fraudulent and void against creditors. The conclusion which I arrive at proceeds upon the broad ground that a man who contemplates going into trade cannot on the eve of doing so take the bulk of his property out of the reach of those who may become his creditors in his trading operations.

[His Honor then referred to some of the correspondence as showing that it was treated in January, 1864, as almost a settled thing that he was to go into the business, and continued: —]

I therefore hold that the settlement of the 24th of February, 1864, was absolutely null and void against the creditors within the meaning of the Statute of Elizabeth, and consequently that when Mr. Douglas executed the deed by which he vested all his property either at law or in equity in the inspectors or trustees, this property vested in them as being his, just as much as if the settlement of the 24th of February had never been executed.

That therefore brings me to the next point which was so much relied upon, namely, the effect of the release of the 22nd of February, 1866. It is said that because Mr. Douglas, in common with other partners,

gave up some of the surplus assets of the Indian firm to pay the deficiency of the London and Liverpool firm, and in consideration of his doing so a release was executed, that had the effect of depriving these plaintiffs of their right to sue in this suit. I am of opinion that it has no such operation. First of all, for the reasons I have stated, I am of opinion that the effect of the deed is that the trustees on behalf of the creditors say, "You have given up all you have to give. We are satisfied you have stripped yourself of everything, and in consideration of your doing so we release you." Now, if Mr. Douglas, instead of giving up his property, had concealed it, I am of opinion that he could not take the benefit of that release, which was procured by his concealment of the facts. Upon that ground alone I should have come to the conclusion that the release for this purpose was inoperative, but upon the other ground, I say that the property was at that time vested in him, and they did not intend to give anything up. They took all the property of which this is part, and therefore the release has not the operation contended for by Mr. Bristowe and Mr. Fischer.

The result is that there must be a decree setting aside the settlement, and I am sorry to say that I see no ground whatever upon which I can relieve either Mr. Douglas or his trustees from the costs. It is very unusual for trustees to come forward as these have done actively to support such a settlement. They have thought fit to do so. In the case of *Crossley* v. *Elworthy*, the remarkable thing was that the wife of Mr. Elworthy would not appear to defend that settlement. Mr. Elworthy himself, I think, did not appear to defend it, but the guardians of the infants appeared to support it, and I therefore made them pay the costs of the suit. So in this case, as the trustees have come forward to uphold the settlement, they with Mr. Douglas are liable to the whole costs. The decree will be to set aside the settlement, with costs against all the defendants.

Mr. Cotton, Q. C., *Mr. Lindley*, Q. C., and *Mr. Fellows*, for the plaintiffs.

Mr. Bristowe, Q. C., and *Mr. Fischer*, Q. C., for the defendant William Douglas and the trustees of the settlement.

KENT *v.* RILEY.

CHANCERY. 1872.

[*Reported L. R.* 14 *Eq.* 190.]

THIS was a suit by the assignee in bankruptcy of William Felix Riley, instituted for the purpose of setting aside a post-nuptial settlement made by him under the following circumstances: —

In February, 1868, William Felix Riley was entitled in fee simple to a freehold house in Albemarle Street, subject to several mortgages

thereon, one of which was in favor of Colonel Leach. He was also entitled to some personal property, the value of which did not exceed £150. He had incurred simple contract debts to the amount of about £760, which he was unable to pay, and he applied to his solicitor, Mr. Francis Leach, the brother of Colonel Leach, and an old friend of Riley's family, to procure him an advance of money. Mr. Leach replied to the application by a letter dated the 14th of February, 1868, in the following terms: —

"I am extremely sorry to read your letter received to-day. You do quite right to ascertain exactly the extent of your liabilities. The sum you mention as owing indeed exceeds what I could have thought. Before I take any step I should wish to see you, because I think the time has come at which you ought to settle the residue of your property on your wife and children; and I cannot be a party to your raising any more money without your doing them this justice. If you will undertake to make the settlement I will see what can be done towards relieving you from your present difficulties. No creditor is, I should think, likely to press you; but should any come to me, I can but say that you propose to make arrangements for payment."

Mr. Leach subsequently had an interview with William Felix Riley, at which it was agreed that the former should procure from his brother, Colonel Leach, a further advance of £550 on the security of the house in Albemarle Street, and that the defendant should convey the equity of redemption to trustees upon trust to sell, and out of the proceeds pay off the mortgages, and then to pay a sum of £400 to William Felix Riley; and that the residue of the proceeds of sale should be settled upon trusts, partly for the benefit of his wife and children, and partly for his own benefit.

Accordingly Colonel Leach advanced £550 on the security of a mortgage of the property, and by an indenture dated the 16th of March, 1868, William Felix Riley conveyed the same property (subject to mortgages for sums amounting in the whole to £3,750) to trustees upon trust to sell, pay off the mortgage debts, and pay the sum of £400 to William Felix Riley; and to stand possessed of the residue of the proceeds of sale upon the trusts declared by an indenture of even date. The trusts so declared were for investment and payment out of the income of an annuity of £40 a year for the maintenance of the wife and children of William Felix Riley, or (in the discretion of the trustees) any one or more of them, and subject thereto for payment of the income to William Felix Riley during his life, and after his death for payment of the income upon the same trusts as were declared of the annuity of £40; and after the death of the survivor of Mr. and Mrs. Riley for the payment or application of *corpus* and income for the benefit of their children.

The property comprised in the settlement was sold in December, 1868, and after payment of the mortgage debts and the sum of £400 to William Felix Riley, there remained a surplus which was invested in

£700 5 per Cent Debenture Stock of the South-Eastern Railway Company, upon the trusts of the settlement of the 16th of March, 1868.

A considerable part of the sum of £550 advanced by Colonel Leach was applied in payment of debts due by William Felix Riley; but the sum of £400, which arose from the sale, was applied by him for other purposes, and debts to the amount of upwards of £360, owing by him on the 16th of March, 1868, still remained unpaid.

On the 18th of March, 1869, William Felix Riley was adjudicated a bankrupt on his own petition, and the plaintiff was appointed creditors' assignee in the bankruptcy; and on the 3d of June, 1871, the bill in this suit was filed to set aside the settlement of the 16th of March, 1868, as being fraudulent under the Statute 13 Eliz. *c.* 5.

Mr. Hinde Palmer, Q.C., and *Mr. Boyle*, for the plaintiff.

Sir R. Baggallay, Q.C., and *Mr. Grenside*, for the defendants.

June 24. LORD ROMILLY, M.R., said that the plaintiff sought to set aside a deed on the ground that it was executed with intent to defeat, delay, or hinder creditors. As had often been observed in these cases, it was impossible to penetrate into a man's mind and ascertain what his intentions were; the facts only could be looked at in order to ascertain what inference could fairly be drawn as to the intention of the settlor. Looking at the facts proved in this case, and particularly at the letter of Mr. Leach, of the 14th of February, 1868, it appeared to his Lordship impossible to come to the conclusion that this settlement was made with the intent to defeat, delay, or hinder creditors; on the contrary, the conclusion he arrived at was that the object of the settlor was to pay his creditors, and for that purpose to raise sufficient money by mortgage of his property, and then to make a settlement of the residue only. The settlement, therefore, could not be set aside; but as the suit had been occasioned by the improper conduct of the settlor in not paying his debts by means of the funds raised, the bill would be dismissed without costs; but the trustees of the settlement might take their costs out of the settled funds.

SPENCER *v.* SLATER.

CHANCERY. 1878.

[*Reported* 4 *Q. B. D.* 13.]

SPECIAL CASE stated in an interpleader issue between the plaintiffs, the trustees under a deed of assignment hereinafter mentioned, and the defendants, the execution-creditors of one Thomas Keating.

The facts were as follows: —

On the 23d of July, 1877, a deed was made between Thomas Keating, thereinafter styled "the said debtor," of the first part, the plain-

tiffs, thereinafter styled "the trustees," of the second part, and the several creditors of the debtor, who should execute the deed or otherwise signify their assent thereto before the declaration of a dividend, of the third part.

The deed assigned all the debtor's estate and effects to the trustees on the conditions and trusts, and for the purposes thereinafter declared, viz.: —

1st. To carry on the business of the debtor, or to get in and realize his estate in such manner as the trustees may deem expedient, and out of the proceeds to pay all fair and usual charges attending the liquidation thereof or incidental thereto; and all rent, taxes, salaries, and preferable claims that would be payable in bankruptcy; and then to apportion the residue according to an equal pound rate to all creditors parties hereto, or of whose claims the trustees shall have received notice, and have no sufficient grounds to dispute or shall dispute the same unsuccessfully.

2d. The execution of this deed, or the assent thereto by any creditor, shall operate as a full release to the debtor in respect of the debt of such creditor so executing these presents or assenting thereto.

3d. The dividend so apportioned to every creditor as aforesaid shall be paid to him, her, or them severally, provided he, she, or they have executed these presents or assented thereto as aforesaid. And on the expiration of twelve calendar months from the date hereof the debtor may apply to the trustees to be paid the dividend or dividends of any creditor or creditors who have neglected or refused to assent hereto or execute this deed; and thereupon the trustees shall give such creditor or creditors written notice by post of such application made by the debtor; and if such creditor or creditors shall for seven days thereafter still neglect or refuse to execute these presents or assent hereto, such dividend or dividends shall be then forthwith paid to the debtor by the trustees.

4th. The trustees may require full particulars relating to the debt of any creditor, and that such debt be verified on oath or by statutory declaration, before admitting such debt or paying dividends thereon.

5th. All matters not herein specially provided for shall be dealt with on principles applicable under the present English bankruptcy law.

7th. And lastly, the several parties hereto, of the third part, do hereby severally, in proportion to their respective claims, covenant, promise, and agree with the trustees to hold them harmless and indemnified from all personal risk, loss, or damage they may sustain by reason of their proceedings under the trusts hereof, excepting such loss or damage as may result from their own wilful negligence or default, and to hold them harmless and indemnified against any claim or claims by any person or persons of which they may not have received notice before making a dividend, and from and against any claim by any future trustee or trustees of the estate and effects of the debtor, and from and against any order of any court made in respect of the debtor

or his estate, or of this deed and the trusts thereof, or any of them, and from and against all costs, damages, and expenses thereof, consequent thereon or incidental thereto.

On the 3d of August, 1877, the defendants obtained a judgment against the debtor for £49, and on the same day a writ of *fi. fa.* was delivered to the sheriff of Lancashire, indorsed to levy the amount of the judgment without any costs.

On the 14th of August the sheriff seized the goods in question under the *fi. fa.*, such goods forming part of the property included in the deed.

The goods were, at the time of the seizure, on premises consisting of a house and shop occupied by the debtor, but from the 22d of July, 1877, up to the time of the seizure, a person employed by the plaintiffs was on the premises to keep possession of the goods for the plaintiffs. On such taking possession of the goods by the plaintiffs the shop was closed. No business was carried on in the shop, nor was the same open to the public. No other indication of any change of possession was visible or open to the public, but the plaintiffs had advertised the property for sale by tender before the seizure under the execution, and had nearly concluded a *bona fide* sale for value of the said property, but the seizure prevented the actual sale and delivering over of the said goods.

The execution-debtor was a trader within the meaning of the Bankruptcy Act, 1869, when he executed the deed, and was then indebted to several creditors respectively, whose debts respectively amounted to £50 and upwards. He was in insolvent circumstances when he executed the deed, and he executed it for the purpose of defeating any execution, including an execution at the suit of the defendants, which was then apprehended by him, and which execution might prevent the equal distribution of the debtor's property among all his creditors, and also for the purposes stated in the said deed.

The question for the court was whether the goods seized by the sheriff or any of them were, at the time of the seizure, the property of the plaintiffs as against the defendants.

Crompton, for the plaintiffs.

R. T. Reid, for the defendants.

MELLOR, J. I am of opinion that our judgment should be for the defendants. I think this deed was invalid by reason of the provisions of 13 Eliz. *c.* 5. Its object plainly was to prevent the creditors from exercising their ordinary remedies in respect of the sums due to them, and to compel them to come in under the scheme of arrangement prescribed by the debtor. By this scheme the trustees may carry on the business if they think fit, and the creditors, in order to get their dividends, must enter into obligations not required of them in the ordinary course of law, for the executing or assenting creditors are to indemnify the trustees against personal risk and loss. If any creditor refuses to come in, there is a resulting trust in favor of the debtor, in respect of

the dividend that would otherwise have been due to such creditor. It seems to me quite clear that the effect is to defeat and delay creditors whose debts are under £50. Creditors to a greater amount might treat this deed as an act of bankruptcy, but those whose debts are under £50 are without remedy if the deed be good. It is admitted that the deed was executed for the purpose of defeating any execution, including that of the defendants, which was then apprehended, and for the purposes stated in the deed itself. We are of opinion that those purposes are contrary to law, for the reasons above mentioned, and therefore that the deed cannot be sustained against the execution creditors.

MANISTY, J. I am of the same opinion. The question is whether this deed is good with reference to the provisions of the Statute 13 Eliz. *c.* 5. That depends on whether or not its object was to defeat, delay, or hinder creditors. It is stated in the special case that the execution of the deed was for the purpose of defeating any execution, including that of the defendants, which might prevent an equal distribution of the debtor's property among all his creditors, and also for the purposes stated in the deed itself. What, then, are the purposes stated in the deed? One of the provisions is that the trustees may carry on the business if they think fit, irrespective of the wishes of the creditors, and any creditor, before getting a dividend, must consent to indemnify the trustees in respect of personal loss and risk. The creditors are not only subjected to serious delay. The trustees may carry on the business and incur debts, and the creditors may suffer. If they come in and assent to the deed, they must indemnify the trustees, and if they do not, they get no dividend, the dividend apportioned to them being handed over to the debtor. This is, at any rate *prima facie*, a resulting trust in favor of the debtor, but the plaintiffs' counsel says that the dissenting creditor might get execution against any such fund in the hands of the trustees, by way of attachment of it as a debt due to the debtor. That is a very remote and doubtful remedy under the circumstances. The deed, in my opinion, tends to defeat, or at least delay, the creditors. It provides that unless the creditor claims his share of the proceeds of the estate in the hands of the trustees upon terms which no prudent man, in my opinion, would come under, that share shall go to the debtor, and the creditor, after a long delay, is left to the shadowy remedy to which I have alluded. The deed seems to me, therefore, to be clearly void under the Statute as containing a resulting trust in favor of the debtor, and tending at least to delay creditors.

Judgment for the defendants.[1]

[1] Cf. *Boldero* v. *London & Westminster Discount Company*, 5 Ex. D. 47 (1879).

EX PARTE RUSSELL. IN RE BUTTERWORTH.

COURT OF APPEAL IN CHANCERY. 1882.

[*Reported* 19 *Ch. Div.* 588.]

JESSEL, M. R.[1] This is an appeal from a decision of the Chief Judge in Bankruptcy, reversing a decision of the judge of the Salford County Court. The County Court judge set aside the settlement as being fraudulent under the Statute of Elizabeth, but he gave no opinion whether it was liable to be set aside under the 91st section of the Bankruptcy Act. The Chief Judge was of opinion that the settlement was not liable to be set aside on either ground.

The case is now before us. It has been very carefully discussed and fully argued, and I am bound to say I think that the settlement is liable to impeachment on either or on both grounds.

The debtor carried on the business of a baker (it was not a large baker's shop) in Manchester, and it appears to have been a tolerably prosperous business up to August, 1878. The debtor had saved money, and had invested money in the purchase of some houses. He also had some furniture in his private residence, which was different from the shop. That being the position of matters, he contemplated taking a grocer's shop in the neighborhood and embarking in the business of a grocer, and he actually purchased that business within a month after the execution of the settlement which I am about to mention. He goes to his solicitor in August, 1878, and says that he wants to settle his property on his wife and children. The solicitor very properly tells him that the settlement will be good for nothing unless he is able to pay his debts irrespective of the property to be settled, and thereupon the debtor drew up a statement of his affairs, showing that he had assets sufficient to enable him to pay his debts irrespective of the property to be settled, and the solicitor, being satisfied, drew up this voluntary settlement, which was duly executed on the 8th of August, settling in fact substantially the whole of the debtor's property, worth something like £1500. I will now read what, according to his own statement, he kept out of the settlement, he being engaged in the business of a baker and contemplating entering into the business of a grocer.

ASSETS.

Cash	£25
Hand cart	7
Working utensils	40
Fixtures	20
	£92

[1] The opinions in the Court of Appeal only are here given.

Debts Owing.

Nelstrop	£23 10
Charles Holt	16 5
McDougall	19 0
	£58 15

Now, I do not wish to cast any reflection on the solicitor: solicitors are not necessarily very good business men. But I must say that, if that statement had been made to me, I should have said that the settlor had not kept out of the settlement assets sufficient to enable him to pay all his debts without the aid of the property comprised in the settlement.

According to the statement the debts due were £58 15*s*. Is a man who has got working utensils in his business, fixtures, &c., which are not available except by a forced sale, the total being worth £92, including £25 in cash, able to pay £58 15*s*.? I should say on the face of it that his assets are not sufficient. A man is not able to pay his debts because he has some odds and ends which can possibly be sold, and on which he puts a fancy value. Therefore, without going into the details, I should not be satisfied with this statement as satisfying the requirements of section 91. But, when we come to the evidence, we find that, instead of owing £58 15*s*., he really owed £111. We find also that, in addition to the assets which he mentioned, he had some flour, which, according to the evidence, could not be worth more than £19 10*s*. On the other hand, the hand cart has disappeared, and whether it was worth £7 or 7*s*. nobody knows. The working utensils and fixtures were sold about three years after the date of the settlement for a little over £12, instead of £60, and it is in evidence that they fetched a fair price. It is said they may have been worn to some extent during the three years. But the evidence shows that they were very old indeed in 1878, and there is nothing to show that they afterwards deteriorated in value. In fact I suppose they were so old that they could not very well deteriorate, but they might have required some repair. The result, therefore, is, that to meet the £111 you have £56 or thereabouts in assets, and it is plain, therefore, that the requirements of the 91st section were not complied with.

It is suggested, however, that the goodwill of the baker's business was worth something. I daresay it was; but can that be called an available asset when a man is carrying on his trade? Is he able to pay all his debts because he might possibly, after the lapse of a considerable time, sell the goodwill of his business? The debts were presently payable. How can a man be said to be able to pay his debts because he has a business the goodwill of which he may be able to sell? It is quite plain that that is not an asset which ought to be reckoned within the purview of this section. Therefore it appears to me clear that the settlement is void under the 91st section.

As regards the other point it is not absolutely necessary to decide it, but I think that the County Court judge was right. The principle of *Mackay* v. *Douglas*, Law Rep. 14 Eq. 106, and that line of cases, is this, that a man is not entitled to go into a hazardous business, and immediately before doing so settle all his property voluntarily, the object being this: "If I succeed in business, I make a fortune for myself. If I fail, I leave my creditors unpaid. They will bear the loss." This is the very thing which the Statute of Elizabeth was meant to prevent. The object of the settlor was to put his property out of the reach of his future creditors. He contemplated engaging in this new trade, and he wanted to preserve his property from his future creditors. That cannot be done by a voluntary settlement. That is, to my mind, a clear and satisfactory principle.

Now, as I understand the evidence in this case, the baker did very well as a baker, and probably he may not have recollected the old proverb, *ne sutor ultra crepidam*. When he went into business as a grocer he was going into a business which it appears he did not understand, and it is obvious that the object was — (I am taking that as a fair inference) — to save his property for his wife and children in case the new business did not succeed. Well, that actually happened. The new business did not succeed; he lost money by it, and it probably brought him to bankruptcy.

His object was, as I have said, to make himself safe against that eventuality, and, if that was his object, then I think the principle of *Mackay* v. *Douglas* applies, and that the deed was void also under the Statute of Elizabeth. But, as I have said before, it is not really necessary to decide this point, because I am clearly of opinion that the deed is void under the 91st section of the Bankruptcy Act.

Baggallay, L. J. I am of opinion that the settlement is void under the provisions of the 91st section of the Bankruptcy Act. By that section a heavy burden is cast upon persons making settlements of this kind. Under any circumstances it would be a difficult thing, even after the lapse of only three or four years, for the persons beneficially interested in a settlement to show that the settlor was at the date of its execution able to pay his debts without having recourse to the settled property, and the difficulty, of course, becomes greater as the time grows longer. The section extends to a period of ten years, and consequently every prudent solicitor who is applied to by a client to prepare a voluntary settlement under such circumstances, would endeavor, as far as he could, to retain some record or other materials which would show at any future time, if the settlement was impeached, that the settlor was able at the time when he made it to meet all his debts without the aid of the settled property. In the case with which we are dealing the solicitor appears to have taken that course. It was of course a prudent step to take, and it was one which might have been of very great use if the settlement had remained longer unimpeached. But now what has happened? Some three years after its date the

settlement is impeached. The burden of proof is upon those who claim under the settlement to show that the settlor's assets (other than those included in the settlement), were sufficient to meet his debts. Upon the face of the memorandum, if it had been accurate, there were assets to the amount of £92 to meet debts to the extent of £58, but it is now admitted that the statement was inaccurate. In the first place, the debts put down at £58 were admittedly £111. Therefore, they in fact exceeded even the estimated amount of the assets. The assets, again, were materially overstated, and though put down at £92, they were, if the evidence is to be relied upon, really not worth more than £37.

Well, what is the way in which those who support the settlement endeavor to get over this? "Oh," they say, "there were other assets besides those comprised in the statement." They say that there were so many sacks of flour that should be taken at a certain price. I am by no means satisfied upon the evidence that those sacks of flour were in the place at the time. On the contrary, in my opinion, there was not anything like a sufficient quantity of flour to bring the assets up to an amount sufficient to cover the liabilities. All the circumstances, when they are inquired into, militate against the statement that there was a considerable amount of flour in the settlor's possession at that time. And another still stronger observation is this: Why was not the flour referred to in the statement of assets, if there existed any flour really available? I have come to the conclusion that those upon whom the burden is cast of showing that there were sufficient assets have failed to sustain it, and therefore the condition, the performance of which would alone entitle the respondents to uphold the settlement, has not been performed, and section 91 consequently applies. I think also that, having regard to all the circumstances of the case, the County Court judge was right in holding that the settlement was void under the Statute of Elizabeth, but I prefer to rest my decision upon the effect of the 91st section of the Bankruptcy Act.

Lindley, L. J. I am of the same opinion. It appears to me that the view taken by the County Court judge was right, that this settlement was void under the Statute of Elizabeth. I differ from the Chief Judge in the view which he took of the circumstances under which the settlement was executed. The settlement was executed by a baker, who had been a thriving and prosperous man. He had saved money. He could pay all his debts. Substantially, he had plenty of assets, but he was going to take a grocer's shop. He knew nothing of a grocer's business. He was perfectly aware that entering upon a business to which he had not been brought up was a risky thing, and, therefore, he made a settlement, settling substantially the whole of his property upon his wife and children. What was that for? Obviously, not simply to benefit his wife and children, but to screen and protect them against the unknown risks of the new adventure.

It appears to me that this is plainly within the principle of *Mackay* v. *Douglas*, one of the most valuable decisions that we have on the

Statute of Elizabeth. On that short ground, I think that the settlement is plainly void.

I also think the settlement falls within the 91st section of the Bankruptcy Act. When we look at the words of that section, and have to consider whether a man is able to pay his debts, we must not merely look at the amount of his assets and liabilities, but we must consider the position which he is assuming. If, for example, this baker had been retiring from trade, of course we must have taken into account all his pots and shovels, the goodwill of his business, and everything else; all those things would be the means of paying his debts. But, if he is going on with his baker's business, it appears to me idle that we should take such things into account as assets. He must be able to pay his debts in the way in which he proposes to pay them, that is by continuing his business. That is the fair way of looking at it, and I am satisfied that he could not pay his debts and also carry on his business with the property left unsettled.

Marten, Q. C., and *Jordan*, for the appellants.

Winslow, Q. C., and *E. Cooper Willis*, for the trustees of the settlement.

IN RE RIDLER.

COURT OF APPEAL. 1882.

[*Reported* 22 *Ch. Div.* 74.]

IN 1872 Richard H. Ridler was a customer of the Worcester City and County Banking Company. On the 31st of December, 1872, his father, Richard Ridler, gave the bank a written guarantee for payment of the balance which should for the time being be owing by R. H. Ridler to an amount not exceeding £1,000. At this time the balance due was above £700, and it shortly afterwards was considerably increased.

On the 25th of May, 1877, the balance due on R. H. Ridler's account being at that time £1,515 12*s.* 1*d.*, Richard Ridler assigned a leasehold property to his son F. W. Ridler, upon trust for R. Ridler for life, with remainder in trust for F. W. Ridler, and the settlor's daughter Ellen Maria Ridler, during their joint lives, and after the decease of either in trust for the survivor. This leasehold was of the annual value of about £210, and was held by the settlor for the residue of a term expiring in 1893, at a yearly rent of £3 10*s.* The settlor's only other property consisted of furniture worth between £100 and £200, and a debt of £1,500 due to him from Richard H. Ridler. It did not appear that he had any debts or liabilities other than the guarantee.

In February, 1880, the bank sued R. H. Ridler for his balance, which then amounted to £1,337, and for £400 due on a promissory note.

R. H. Ridler, in July, 1880, filed a petition for liquidation, and a composition of 3*s.* in the pound was accepted by the creditors. The bank proved for £1,771, and Richard Ridler for £1,929.

In the same month the bank commenced an action against Richard Ridler on his guarantee. On the 24th of November, 1880, Richard Ridler died leaving a will. A decree was made in the actions of *Ridler* v. *Ridler* for the administration of his estate, and the bank were admitted as creditors for £1,000 with interest from the date of the writ in their action and costs of that action.

On the 1st of November, 1881, the bank obtained liberty to attend proceedings in the administration action, and at their instance inquiries were added to the judgment what real or leasehold estate the testator was entitled to at his death, and as to incumbrances upon it, and an inquiry whether the testator settled or purported to settle any and what leasehold estate, and whether such settlement was void against the bank, or any other creditors of the testator.

F. W. Ridler deposed that at the time of the execution of the settlement R. H. Ridler, who was a farmer, was in solvent circumstances and in good credit, and well able to pay the £1,500 which he owed to the testator, and that neither the deponent nor the testator suspected that there was any likelihood of his getting into difficulties and becoming unable to meet his liabilities. He went on to say that the testator had given to R. H. Ridler £1,200 for his advancement, and made the settlement *bona fide* for the purpose of giving F. W. Ridler and his sister an equivalent benefit and without any idea of defrauding any persons having claims upon him.

The chief clerk expressed his opinion that the settlement should be supported on two grounds: (1) that the bank were not creditors in the strict sense of the term at the date of the deed, and (2) that there was nothing to show that the testator in executing the deed was actuated by any intention of defrauding them or any other of his creditors. He accordingly certified that the settlement was not void against the bank or any other creditors of the testator.

A summons by the bank to vary this certificate was adjourned to be heard by Vice-Chancellor Bacon in court on the 6th of May, 1882.

[*Bacon*, V. C., dismissed the summons, and the bank appealed.]

Davey, Q. C., and *C. H. Turner*, for the appeal.

Hemming, Q. C., and *Yate Lee*, contra.

Lord Selborne, L. C. The argments on behalf of the respondents turned much on the proposition that when a person is liable on a guarantee he is not to be regarded for the present purpose as owing a debt of that amount, without taking into account the assets of the principal debtor as well as his own. There is a fallacy in this. To hold that a guarantor can make a voluntary settlement of the whole of his property and support it by showing that when he made it the person guaranteed had assets enough to pay the amount guaranteed, would go far to defeat the contract of suretyship. We must look at the matter as if the event

had already happened, the possibility of which the parties must have had in contemplation when the guarantee was given, of the debtor being unable to pay. I do not think that any close inquiry as to the supposed capacity of the person guaranteed to pay the debt ought to be entered into. I do not say that there might not be a state of things in which the liability of the guarantor might be so remote that it need not be regarded; but if he conveys away all his property by a voluntary settlement I think it doubtful whether the settlement could in any case be supported in the event of his ultimately being called on under his guarantee. Here the son had no margin of property beyond what was employed in his farm and what he had borrowed from the bank, for which the bank would not give him credit without a guarantee. I think that he had not assets to such an extent as to prevent the father's liability under the guarantee from being a serious and substantial one at the time when the settlement was executed.

Unless, then, we are to enter on a speculation as to what the son's capacity for payment was at the time of the execution of the settlement, we can only consider the state of the father's assets. They consisted of a debt of £1,500 due to him from the very person for whom he had given the guarantee, and furniture not exceeding in value £200. The debt due from the son cannot be looked upon as an available asset for meeting the liability on a guarantee given for the son.

It is urged that as the son, even after several years of agricultural depression, paid a dividend, the debt due from him must be considered as having been of substantial value at the time of the settlement; that the life interest retained by the father must be taken into account, and that taking them together the father retained assets more than sufficient to meet the liability in the guarantee. I think that this argument cannot prevail. The Statute speaks not only of defrauding, but of delaying or hindering creditors. Now a voluntary settlement of this kind would certainly tend to delay or hinder creditors, even if we took the sanguine view of the settlor's assets which was urged at the bar. The father when he made the settlement must have known that if the son could not pay the balance to the bank he himself, if the settlement was sustained, would have substantially nothing available to meet the liability under the guarantee but such dividend as he could get from the son's estate. I am of opinion that a settlement made under such circumstances cannot be supported against the creditors.

JESSEL, M. R. I am of the same opinion, and will only add a word as to my observations upon *Price* v. *Jenkins*, 5 Ch. D. 619 in *Ex parte Hillman*, 10 Ch. D. 622. I give no opinion whether I should have come to the same conclusions as the judges who decided *Price* v. *Jenkins*. Treating that case as well decided, I think it has no bearing on cases under the Statute 13 Eliz. c. 5. That Statute excepts from its operation estates and interests conveyed "upon good consideration and *bona fide*." What was the meaning of "good consideration" in that exception? It could not mean that if some obligations attaching

to the property went to the new owner in exoneration of the settlor, that made the conveyance a conveyance for valuable consideration. Consider the consequences of such a proposition. Suppose a man transfers £10,000 worth of railway shares or bank shares which are not fully paid up, is that prevented from being a voluntary transfer by the mere fact that the transferor is exonerated from the liability to calls, and the transferee becomes subject to it? If a man makes a settlement of a large freehold estate along with a small leasehold, is the settlement made for valuable consideration within the meaning of this Statute because the grantee becomes liable to the rent of the leasehold in exoneration of the settlor? Whatever may be held under the Statute 27 Eliz. c. 4, the undertaking the liability to rent is not a good consideration within the meaning of the Statute now before us.

Cotton, L. J. I also am of opinion that *Price* v. *Jenkins*, which was decided upon the construction of another Statute, has no bearing on the present case. It had been decided under the Statute 27 Eliz. c. 4, that a voluntary conveyance, though honestly and fairly made, was fraudulent as against a subsequent purchaser from the settlor. *Price* v. *Jenkins* qualified that doctrine, and decided that the grantor's undertaking the liability for rent was sufficient to support a settlement which was open to no objection but that of being voluntary. It is a decision of this court, and we have not to consider whether it was right or wrong, for we are bound by it, but it has no bearing on a case under 13 Eliz. c. 5, where the question is whether a settlement was made with intent to defeat or delay creditors. A man who makes a settlement without leaving himself enough property to pay his creditors must be considered to do it with an intent to defeat or delay them, and a conveyance of leaseholds made for no consideration cannot be brought within the exception in the Statute by the mere fact that the grantee becomes liable for the rent.

Then as to the point that the settlor was not indebted, but only subject to a liability which might never become a debt. A man is not at liberty to take a sanguine view, but is bound to act upon a reasonable view of what is likely to happen. In the circumstances of this case, any reasonable man must have looked upon this guarantee as one which would probably be enforced, and the settlement must be taken as made with intent to delay or hinder creditors.

EX PARTE MERCER. IN RE WISE.

COURT OF APPEAL. 1886.

[*Reported* 17 *Q. B. Div.* 290.]

APPEAL from an order of the judge of the Croydon County Court, by which it was declared that a postnuptial settlement executed by H. J. J. Wise, a bankrupt, was fraudulent and void as against the trustee in the bankruptcy, and the trustee of the settlement was ordered to deliver it up to be cancelled.

The bankrupt was a master mariner. In the year 1881 he was engaged to be married to Miss Emily Agnes Vyse, but, being at Hong Kong in the course of a voyage, he, on the 31st of May, 1881, married another lady. On the 25th of August, 1881, Miss Vyse commenced an action for breach of promise against him in the Queen's Bench Division, and on the 8th of October, 1881, he was served with the writ at Hong Kong. He was under the will of his stepfather entitled to a legacy of £500, subject to a life interest given to his mother. His mother died on the 11th of May, 1881, and thereupon the legacy vested in the bankrupt in possession. The money was in the hands of W. P. Brown, the executor of the will. On the 17th of October, 1881, the bankrupt executed at Hong Kong, where he then was, a voluntary settlement of this legacy, whereby he assigned the legacy to Brown, on trust to invest the same, and to pay the income thereof, during the joint lives of Wise and his wife, to the wife for her separate use without power of anticipation, and, after the death of such one of Wise and his wife as should first die, to pay the income to the survivor during his or her life, and after the death of the survivor, Brown was to stand possessed of the trust fund in trust for the children of the marriage as therein mentioned, and, in default of children, in trust for Wise absolutely. On the 20th of July, 1882, Miss Vyse obtained judgment in the breach of promise action for £500 damages and costs. On the 14th of November, 1884, Wise was adjudicated a bankrupt.

The bankrupt made an affidavit in the County Court, in which he stated that at the time of the execution of the settlement he was perfectly solvent and able to pay his debts without the aid of the property comprised in the settlement.

After the order had been made by the County Court judge, the bankrupt made a further affidavit, and an affidavit was made by Brown, and these affidavits were used on the hearing of the appeal by the Divisional Court. The bankrupt in his further affidavit said that he was not aware that he was entitled to the legacy until he received at Hong Kong, between the 12th and 16th of October, 1881, a letter from Brown informing him of it. When he married he was not aware that he had any property to settle. Immediately he received notice of the legacy

being due to him, he instructed some solicitors at Hong Kong to prepare the settlement. He said that the writ which had been served on him in the breach of promise action had no influence in inducing him to make the settlement, as he considered the writ was merely a threat, and that he should hear nothing more about the action. When he received the intimation of the legacy he told his wife that he should settle it on her, as it was the only money she would have in case of his death. She did not suggest to, or request, or influence him in any way in making the settlement, but it was made solely as a provision for his wife or any children they might have in case of his death; and, had he known before his marriage that he was entitled to the legacy, he should certainly have settled it before his marriage. He was not cross-examined on this affidavit.

Mrs. Wise and Brown appealed from the order of the County Court.

[The Divisional Court sustained the appeal; and the trustee in bankruptcy appealed.]

W. H. Lynden Bell (*Morgan Howard*, Q. C., with him), for the appellant.

H. D. Greene, Q. C., and *F. Cooper Willis*, for Mrs. Wise and the trustee of the settlement, were not heard.

Lord Esher, M. R. I think the decision of the Divisional Court was right.

The argument was first put in this way: It is necessary to prove that the bankrupt, at the date of the voluntary settlement, intended to defeat and delay a creditor or his creditors generally; the necessary consequence of what he did was to defeat and delay his creditors; and, therefore, as a proposition of law, the tribunal which had to consider whether he did intend to defeat and delay his creditors was bound to find that he did. In support of that proposition *dicta* of great and eminent judges were cited. I will venture to say as strongly as I can that to my mind that proposition is monstrous. It is said that it is a necessary inference that a man intends the natural and necessary result of his acts. If you want to find out the intention in a man's mind, of course you cannot look into his mind, but, if circumstances are proved from which you believe that he had a particular intention, you infer as a matter of fact that he had that intention. No doubt, in coming to a particular conclusion as to the intention in a man's mind, you should take into account the necessary result of the acts which he has done. I do not use the words "necessary result" metaphysically, but in their ordinary business sense; and of course, if there was nothing to the contrary, you would come to the conclusion that the man did intend the necessary result of his acts. But, if other circumstances make you believe that the man did not intend to do that which you are asked to find that he did intend, to say that, because that was the necessary result of what he did, you must find, contrary to the other evidence, that he did actually intend to do it, is to ask one to find that to be a fact which one really believes to be untrue in fact. Whether the fact

that the necessary effect of a voluntary deed is to defeat or delay the creditors of the grantor will make the deed void under the Statute of Elizabeth, although there was no such intent in his mind at the time when he executed it, is a question which we are not now called upon to decide. But that is a question wholly independent of the question of intention. That may be the law; the courts may have put that construction on the Statute. But that is a different proposition from that which was put forward in argument, and I will not undertake to decide it now. It must be recollected that the Statute of Elizabeth applies, and may make a deed void, even though the grantor never becomes a bankrupt. But this case was at first argued, not upon that footing, but upon the assumption that, if the natural or necessary effect of what the settlor did was to defeat or delay his creditors, the court must find that he actually had that intent. That proposition or doctrine I entirely abjure.

We must look at all the facts of this case. The bankrupt was a captain of a merchant ship, and there is no evidence whether his employment ceased at the end of every voyage, or whether it was a constant employment. He had promised to marry Miss Vyse. Then he went to Hong Kong, and there he married another lady, and so laid himself open to an action for breach of promise of marriage by Miss Vyse. That action having been brought, might, so far as any one could foretell, have resulted in a verdict either for 1*s.* or for £500 damages; no one could tell what the result would be. Well, he married the lady in Hong Kong in May, and in October there came out to him, by the same post from England, the information that he had become entitled to a legacy of £500, and also the information that Miss Vyse had brought an action against him for breach of promise of marriage. This was the first time that he had had any intimation of the fact that he had any realized fortune, and he immediately settled the £500 upon his wife and children.

Now, what was his position at that time? According to his evidence, which is not disputed (for he has not been cross-examined on his affidavit), he did not owe a shilling in the world. There is no evidence that he had not money owing to him for wages, and in all probability he had, because, if his voyage did not terminate at Hong Kong (and there is no evidence that it did), if he had got to take his ship home to England, in all probability his wages were not payable until the end of the voyage. If so, he would have means to that extent, and he did not owe a shilling.

Now with regard to the action, how could any one — how could his legal adviser — have told him what the amount of the verdict was likely to be? If the verdict had been for £50, and he had had £50 coming to him at the end of his voyage, he would have been able to pay it, and on another occasion he would have been able to pay the costs. It was entirely a matter of speculation what the amount of the verdict would be. Therefore he was not insolvent; it was not the necessary conse-

quence of what he did to defeat or delay the plaintiff in the action, for, if the verdict had been for a small amount, she would not necessarily have been delayed for a week.

In order to make this deed void under the Statute of Elizabeth (however far that Statute may be stretched), we are bound in the present case to find that there was an actual intent in the bankrupt's mind to defeat or delay his creditors, and there is no evidence of such an intent. He has sworn that he was not thinking of his creditors. The only creditor, that it is suggested he had to think about, was Miss Vyse, and no one could tell what the verdict in her action would be. But what happened afterwards? It is obvious that, when the action came on for trial, evidence must have been given about this £500 legacy to which the defendant was entitled, and the jury took the vindictive view of the plaintiff, and gave her as damages the whole of the defendant's realized property. It was a startling verdict, which I certainly should not have anticipated, and I do not see why he was bound to anticipate it. When you have got those facts, and you are asked to conclude that the bankrupt actually intended to defeat Miss Vyse's claim, it seems to me that the Divisional Court were perfectly justified in declining to find that he had any such intent. Upon the facts, I cannot find that there was such an intent.

The appeal must be dismissed.

Lindley, L. J. The evidence before the County Court judge differed materially from that which was before the Divisional Court, and I am not surprised at the view which he took of the case. Unexplained, the circumstances had a very suspicious appearance. But the affidavits which have been filed since the hearing in the County Court give a totally different complexion to the transaction, and it was upon those affidavits that the Divisional Court took the view contrary to that which had been taken by the County Court judge. Now we have all the facts before us, and we must apply the law to those facts. There is a voluntary settlement made by a man who had not a farthing of debts, but against whom an action had been commenced for breach of promise of marriage. At the time when he made the settlement a sum of £500 had just accrued to him, and he settled it upon his wife and children. He tells us, and the Divisional Court believed him, and I also believe that he was speaking the truth, that he thought the action for breach of promise would come to nothing. At all events, the result of it was in the highest degree speculative; he was not then indebted to the plaintiff, but she had made a claim against him which might or might not result in damages. We have, therefore, to deal with the case of an honest man, not in fact indebted at all, and the question is, whether we are driven (not by the Statute of Elizabeth, but by a series of decisions upon it) to say that the settlement cannot stand. I do not think we are. It is true that voluntary settlements have been set aside under the Statute, as it has been construed for a great number of years, in cases in which there was no actual intention to defraud. It

has been held to be sufficient if, when the settlement is executed, the circumstances are such that it must have that effect. But the language which has been used in a great many cases, that a man must in point of law be held to have intended the necessary consequences of his own acts, is apt to mislead, by confusing the boundary between law and fact, and by consequences which can be foreseen with those which cannot. But although I am not prepared to say that a voluntary settlement can never be set aside under the Statute of Elizabeth, as it has been construed, unless there has been in fact an intention to defraud, I am not aware of any decision which goes the length of upsetting the present deed under the circumstances with which we have to deal. In this case there was no intention to defeat the plaintiff, and, when the settlement was executed, the probability of the plaintiff obtaining substantial damages was very slight. The case is certainly not within the language of the Statute. I have no doubt that the view taken by the Divisional Court was right.

I should add that I have looked at s. 47 of the Bankruptcy Act, 1883, and it is quite clear that it does not apply.

Lopes, L. J. We need only consider the law so far as it applies to the facts of the present case. It has been argued that, if the necessary effect of a voluntary settlement is to defeat or hinder creditors, the court is bound to infer such an intent, whether it did or did not in fact exist. I will express no opinion upon that matter, because it is not necessary for the purpose of deciding the present case. It cannot, according to my view, be said that it was the necessary consequence of this voluntary settlement to defeat or hinder the settlor's creditors. The only suggested creditor is Miss Vyse. There are many reasons why it was not a necessary consequence of the settlement that her claim should be defeated. The action might have failed for various reasons; the plaintiff might not have been willing to pursue it; it might have resulted in a verdict for the defendant, or in a verdict for the plaintiff with very small damages. There are many other ways in which the action might have terminated, without its resulting in a verdict for £500. It seems to me, therefore, that it cannot be said that the necessary effect of the settlement was to defeat or hinder Miss Vyse.

What, then, is the question in this case? The question which I should have left to the jury is this: Whether, having regard to all the circumstances, the settlor intended to defeat or hinder his creditors? That is a question of fact which can only be determined by the evidence. Before the County Court judge there was only one affidavit, and he came to a conclusion at which I am not at all surprised. Before the Divisional Court there were several other affidavits, and they arrived at a different conclusion, with which I entirely agree. I adopt the words of Cave, J., when he says, "Looking at the facts which are established by the affidavits, it appears to me reasonably clear that the settlor had no intention whatever of defrauding his creditors, and that

he had not got Miss Vyse and her claim in his mind when he made the settlement." I entirely agree with that conclusion, and I think the decision of the Divisional Court was right.

SALMON *v.* BENNETT.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1816.

[*Reported* 1 *Conn.* 525.]

THIS was an action of ejectment for three pieces of land in Weston. The general issue was pleaded, and closed to the court by agreement of the parties. The cause was heard at Fairfield, December Term, 1815, by *Edmond*, *Smith*, and *Hosmer*, JJ.

It was admitted, by both parties, that Stephen Sherwood was formerly the owner of the demanded premises. The plaintiff claimed title thereto, by virtue of the levy of an execution in his favor against Stephen Sherwood in 1814. The defendant claimed title by virtue of a deed from Stephen Sherwood to his son Salmon Sherwood, dated the 17th of December, 1798; and a deed from Salmon Sherwood to the defendant, dated the 6th of March, 1802. The deed from Stephen Sherwood to his son was given for the consideration of natural affection only; and this fact was well known to the defendant when he made the purchase and took the conveyance from Salmon Sherwood. The plaintiff contended, that his demand against Stephen Sherwood, on which said execution was afterwards obtained, arose long before and subsisted at the execution of the first-mentioned deed; and in proof of this, the plaintiff introduced the record of a suit in chancery before the Superior Court, in December, 1809, brought by him against Stephen Sherwood, complaining of false and fraudulent representations, in the sale of Virginia lands in December, 1794, respecting their situation and value, together with certain defects in the title, and praying for a reimbursement of the purchase money with interest, which was accordingly decreed. The defendant proved, that Stephen Sherwood, when he executed the deed of gift to his son, was not indebted to any person, except to the plaintiff, in the manner stated; and that the land thus conveyed did not contain more than one eighth part of his real estate. But it was admitted, that long before the levy of said execution, he had conveyed, by several deeds, all his real estate, and was, at that time, entirely destitute of property. Upon these facts the plaintiff contended, that the deed from Stephen Sherwood to Salmon Sherwood was fraudulent as against the plaintiff; and even if there was no actual fraud, yet being voluntary, it was void. The defendant, on the other hand, insisted that the deed was not made to defraud creditors, and

was not void. The court reserved the case for the consideration and advice of the nine judges.

Daggett and *N. Smith*, for the plaintiff.

Sherman and *T. S. Williams*, contra.

SWIFT, C. J. Fraudulent and voluntary conveyances are void as to creditors; but in the case of a voluntary conveyance, a distinction is made between the children of the grantor and strangers. Mere indebtedness at the time will not, in all cases, render a voluntary conveyance void as to creditors, where it is a provision for a child in consideration of love and affection; for if all gifts by way of settlement to children, by men in affluent and prosperous circumstances, were to be rendered void upon a reverse of fortune, it would involve children in the ruin of their parents, and in many cases might produce a greater evil than that intended to be remedied. Nor will all such conveyances be valid; for then it would be in the power of parents to provide for their children at the expense of their creditors. Nor is it necessary that an actual or express intent to defraud creditors should be proved; for this would be impracticable in many instances, where the conveyance ought not to be established. It may be collected from the circumstances of the case. But in all cases where such intent can be shown, the conveyance would be void, whether the grantor was indebted or not. In order to enable parents to make a suitable provision for their children, and to prevent them from defrauding creditors, these principles have been adopted, which appear to be founded in good policy. Where there is no actual fraudulent intent, and a voluntary conveyance is made to a child in consideration of love and affection, if the grantor is in prosperous circumstances, unembarrassed, and not considerably indebted, and the gift is a reasonable provision for the child according to his state and condition in life, comprehending but a small portion of his estate, leaving ample funds unencumbered for the payment of the grantor's debts; then such conveyance will be valid against conveyances existing at the time. But though there be no fraudulent intent, yet if the grantor was considerably indebted and embarrassed at the time, and on the eve of a bankruptcy; or if the value of the gift be unreasonable, considering the condition in life of the grantor, disproportioned to his property, and leaving a scanty provision for the payment of his debts; then such conveyance will be void as to creditors. In the case under consideration, it is manifest there was no fraudulent intent; the gift constituted but a small part of his estate; was a reasonable provision by the father for the son, according to their condition and circumstances; and much more than sufficient for the payment of the debt due to the plaintiff remained in the hands of the grantor. I am, therefore, of opinion that the indebtedness of the grantor at the time of the conveyance, the only circumstance that can operate against it, is not such as ought to set it aside, especially as a great length of time has elapsed, and the estate has passed into the hands of a *bona fide* purchaser, for a valuable consideration.

In this opinion TRUMBULL, EDMOND, SMITH, BRAINARD, BALDWIN, GODDARD, and HOSMER, JJ., concurred.

GOULD, J. There is no case, I trust, in which a conveyance to a child, founded upon natural affection, has been adjudged void, as to *creditors*, for the mere want of a valuable consideration; though there are several adjudications the other way. The question in *Doe* v. *Manning*, 9 East, 59, it should be recollected, arose under the Statute 27 Eliz.: and it is familiar to the profession, that *purchasers*, for whose protection that Statute was made, have always been more favored in the construction of it, than *creditors*, under that of the 13 Eliz. The former not having trusted to the personal responsibility of the grantor, but having advanced money, only upon a conveyance of the *specific* property in controversy, and in confidence of acquiring an immediate title to it, are regarded as having a higher equity than general creditors. This diversity of construction is agreeable to all analogy. Hence, the construction of the Statute 27 Eliz. has always been more rigorous, as against conveyances not founded on valuable consideration, than that of the Statute 13 Eliz.

As to *creditors*, the want of a valuable consideration may be, under circumstances, a *badge* of fraud; but does not, *per se*, render the conveyance fraudulent. Whether an actual fraudulent *intent* is necessary to render it so is a distinct question. It is sufficient for the present purpose that *something more* than the mere absence of a valuable consideration, must appear, in order to invalidate such a grant. Evidence of indebtedness, at the time, at least, and, as I conceive, of indebtedness, amounting, or approximating, to embarrassment, must be shown. For if any degree of indebtedness, however small, would defeat such conveyances; they would, virtually, be *per se* fraudulent: since no individual, perhaps, or, at least, hardly any one, in the community, is at any time, *absolutely* free from debt. And as I discover, in this case, no such evidence, as I suppose, the rule requires, I cannot pronounce the conveyance to Salmon Sherwood, fraudulent. Holding this opinion, it is, of course, unnecessary for me to consider, whether the deed to the defendant would be void, as against creditors, supposing the first conveyance to have been so.

Judgment to be given for the defendant.

HARRIS *v.* SUMNER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1824.

[*Reported* 2 *Pick.* 129.]

REPLEVIN of the ship John and her cargo, which were attached by the defendant, a deputy sheriff, as the property of Michael Coltman, upon a writ in favor of Josiah Bradlee and another.

At the trial before *Parker*, C. J., the question was, whether the property in these articles was in Coltman or in the plaintiffs, at the time of making the attachment.

The plaintiffs, to prove their property in the articles in question, produced in evidence an instrument bearing date the 7th of September, 1822, but which was actually made out, and signed and sealed by Coltman and the plaintiffs, on Sunday the 8th of September. This instrument recited that Coltman had given the plaintiffs a bill of sale of the ship, and purported to be an assignment by him of what he believed to be the whole of his property (wearing apparel and furniture of but little, if any, amount beyond what the law exempts from attachment excepted), that is to say, all the cargo of the ship, &c. to the plaintiffs, to have and to hold the ship, cargo and other property to the plaintiffs, in trust to sell the same, and with the proceeds, first, to pay themselves 407 dollars, 35 cents, the amount due to them from Coltman, and to pay over the residue to other creditors of Coltman, who should execute the instrument, in equal proportions, according to the amount of their respective demands. It contained a covenant on the part of the plaintiffs to execute the trust, and an agreement on the part of the other creditors, that the plaintiffs, after paying themselves the sum above mentioned, might pay to Coltman 1000 dollars, provided the residue should net these other creditors 70 per cent of their demands, and if not, then such a proportion of 1000 dollars as they should receive of 70 per cent. It was intended that the instrument should be tripartite, but two parts only were made out and executed by Coltman and the plaintiffs on Sunday, one of which was taken and kept by each of those two parties. A delivery of the property was made to the plaintiffs on the same day. Soon after 12 o'clock on Sunday night the defendant made the attachment. Neither of the persons whose names appeared on the instrument as parties of the third part, had signed it before Monday, after the attachment was made.

Several objections were made to the assignment; one of which was, that it was void as against creditors on account of the reservation in favor of Coltman. The judge being of this opinion, by his recommendation a nonsuit was entered, with liberty to move that it should be taken off and a new trial granted.

A. Townsend now moved to have the nonsuit taken off.

W. Sullivan and *Mason*, for the defendant.

PUTNAM, J., delivered the opinion of the court. The question to be settled in this case is, whether the ship, appurtenances and cargo belong to the plaintiffs, who claim in virtue of the assignment from Coltman, or whether the defendant shall have the same for the use of Bradlee, who claims in virtue of an attachment of the same as the property of Coltman.

The cause has been elaborately argued. Many points have been raised, and many authorities have been cited in support of them, upon

which, from the view we have taken of the case, it is not necessary to remark.

It has been objected that the creditors of the third part had not executed the instrument, or accepted the grant, before the attachment. But upon the authority of *Baldwin* v. *Hastings*, 17 Mass. Rep. 556, the signature of the plaintiffs may be considered as having a double aspect, viz. as the signature of creditors, as well as of trustees, of Coltman. The same objection was raised to the assignment in that case; but it appearing that the trustees, who were the second party to the instrument, were also creditors who were to be paid out of the fund, it was thought that the instrument was well executed. The case was the same here. And although the debt of the plaintiffs was small in comparison with the property assigned, it was not necessarily for that cause void. That circumstance would only be evidence to the jury tending to prove the transaction fraudulent.

This view of the case makes it unnecessary to examine the numerous authorities which have been cited by the plaintiffs' counsel, to prove that an assignment made to trustees, with an honest intention of making a fair distribution among *all the creditors, is good*, notwithstanding they had not assented prior to an attachment; for the plaintiffs being creditors and having assented, the property would pass to them, although no other creditors should have become parties, if the conveyance were free from all other objection.

It has been contended that it should have been left to the jury to have decided upon the whole matter, whether the conveyance were fraudulent or not. But where the defect is apparent upon the deed itself, the effect of it becomes a question of law. It would be worse than useless to submit it to the jury to say, upon such evidence, whether it should be void against creditors or not, when if they should happen to decide against the legal effect of the instrument, it would be the duty of the court to set aside the verdict. In *Murray* v. *Riggs*, 15 Johns. Rep. 588, Thompson, C. J., says, "Whenever the fraud, if it exist at all, is to be collected only from the deeds themselves, it then becomes a question of fraud in law." *Vid. Lavender* v. *Blackstone*, 2 Lev. 146; *Tarback* v. *Marbury*, 2 Vern. 510, *S. P.*; *Tyre* v. *Littleton*, 2 Brownl. 190, *S. P.*

The great question, therefore, arises from the face of the deed. It purports to convey the property to the plaintiffs, in trust, that they should sell the same, and from the proceeds of the sale should pay themselves 407 dollars, 35 cents, the amount of their demand against Coltman, then should pay to Coltman 1000 dollars, provided the residue of the proceeds of the sale should pay to the creditors who should execute the instrument 70 per cent, and if not, then should pay to Coltman such proportion of 1000 dollars as the creditors should receive of 70 per cent. Many cases have been cited by the counsel for the plaintiffs, in support of this conveyance, from English and from American decisions. One of the former, which was much relied upon, is the case

of *Estwick* v. *Caillaud*, 5 T. R. 420, which was to the point presented upon the face of the deed, viz., the reservation of the 1000 dollars to the vendor.

In that case Lord Abington conveyed to trustees, to pay one half for the use of himself, and the residue for the use of certain creditors. But the great distinction between that case and the case at bar is, that it did not appear that the deed conveyed the whole of Lord Abington's property. There was nothing appearing upon the face of the deed that could be a fraud upon the bankrupt laws. But the deed of Coltman expressly states, that the property it purports to convey was all that he had, excepting such as was by law exempted from the attachment of his creditors. In the case cited there was only a preference given to certain creditors; which of itself is not objectionable; and it was not made under the contemplation of an insolvency. Lord Kenyon very properly held, that such preference might well be given, if the property which was set apart did not exhaust the whole estate. Ashhurst, J., observes that one may give a preference, provided the bankrupt laws do not interfere. So here, one may prefer, if the attachment laws do not prevent.

The question in this case is, whether an insolvent debtor may transfer his whole property in such manner as to make a provision for himself, and to lock it up from his creditors who do not feel satisfied to accept of their proportion of the residuum.

We are referred also to *Murray* v. *Riggs*, 15 Johns. Rep. 589, as establishing the position, that the grantors' reserving to their own use a very considerable sum, 2000 dollars a year, for their maintenance and support, does not form any objection to the appropriation of the residue. In that case the court remark, "though in case of a deficiency to satisfy the creditors, they might apply to a court of equity, for the appropriation of the property so reserved, towards the payment of their demands."

So it should seem, that in New York the creditors would have a remedy for the property reserved by the debtor. It would be difficult to find such remedy here. The equity power of the court could not extend to such a case, and it might happen that the trustee would be unable to pay, if the money should be attached in his hands. The question still recurs, whether by the conveyance to the plaintiffs a creditor shall be prevented from attaching the property itself. Does it not delay, hinder and defraud creditors, and is not that intent apparent in the deed itself? The case cited from 15 Johns. Rep. overruled the decision of Mr. Chancellor Kent, appearing in 2 Johns. Ch. Rep. The Chancellor remarks, in that case, that a reservation to the grantor does not destroy the deed as to the remainder (as in the case of *Estwick* v. *Caillaud* above cited, as it must be considered that Lord Abington had no intent to delay or defraud), and that the creditors might go into a court of chancery for the amount reserved. But the Chancellor did not support that conveyance. He observes, in very strong terms,

"If an insolvent debtor may make sweeping dispositions of his property to select and favorite creditors, yet loaded with such durable and beneficial provisions for himself, and encumbered with such onerous and arbitrary conditions and penalties, it would be impossible for courts of justice to uphold credit or to exact the punctual performance of contracts."

But however this conveyance might be considered in New York, or elsewhere, we must try it by the provisions of our own attachment laws. It is the policy of this State, that the property of debtors should be liable to be attached for the use of the attaching creditor, and not for the benefit of all the creditors. There is no Statute of insolvency applicable to living debtors here.

In the case of *Widgery* v. *Haskell*, 5 Mass. Rep. 151, this subject was much discussed; and if the decision of this court, as pronounced by Parsons, C. J., is not to be overruled, it seems to be conceded by the counsel for the plaintiffs that the conveyance cannot be supported. In that case Taber & Son made a deed to pay Widgery and others, and such as would come into the arrangement upon certain terms prescribed by themselves, the debtors; among other things, providing that the claims against them should be settled by referees. The property was attached by a creditor who did not like, and had not assented to the conveyance. In that case the court say, that the intent of the parties to the deed was "to compel the discharge of the grantors from all their debts, by locking up from every creditor who would not discharge them, every part of the estate of the grantors." "Does the law allow an insolvent debtor to make this bankrupt law for himself?" "The creditor must be a party or assenting to this payment or conveyance. If he be not, &c., nothing passes from the debtor, and his estate intended to be conveyed remains liable to attachment by any other creditor." "This opinion is agreeable to the course of decisions on this subject in the courts of this State."

In the case at bar, the avowed intent is to lock up the debtor's property, unless his creditors will permit him to take nearly one third of it for himself, and will take the residue in full discharge of their demands.

The doctrine of *Widgery* v. *Haskell* has been recognized in *Stevens* v. *Bell*, 6 Mass. Rep. 342. But if this was under consideration for the first time in our court, we should all come to the same result. Suppose the deed upon the face of it were good, and a creditor should prove to a jury that it was given upon a secret trust for the benefit of the grantor, to the intent to delay the creditors; the court would be bound to instruct them, that it would be void as against the creditors. Can it make the case better for the plaintiffs, that the trust is avowed in terms in the deed itself?

It has been argued, however, that the decision in the case of *Widgery* v. *Haskell* was induced partly from the consideration, that the court had no adequate equity powers to compel a performance of trusts. But

if this cause was before us as a court of equity, and the parties interested were all before us, we could not compel a performance of the trust in favor of the debtor. It would be no less a fraud upon the attachment law, in a court of equity, than in a court of law.

But it has been further contended, that the deed of Coltman was upon a valuable consideration; that so far as the plaintiffs were concerned, it was made to provide for an honest debt, and the property should be adjudged to pass to the plaintiffs; and that the remedy of the creditors dissenting, should be by attaching the surplus in the plaintiffs' hands after deducting their debt from the amount of the sale.

We have considered that argument, which was pressed with great zeal and learning, but cannot admit its validity. The plaintiffs become parties to a deed, which upon its face appears to be made with intent to delay, defeat or defraud creditors. They are *participes criminis*. In *Burlingame* v. *Bell*, 16 Mass. Rep. 324, the court held, that "in the case of a fraudulent assignment, there can be no lien in favor of the assignee." "The man, who fraudulently receives the property of another, to prevent its being attached, ought not to have the right, against the will of the creditors, whom it is attempted to defraud, to have the opportunity to perfect the fraud, by disposing of the goods, and leaving the creditor *his* liability only for his security."

In *Hills* v. *Elliot*, 12 Mass. Rep. 31, it was said by the Chief Justice, when speaking of secret trusts and confidences for the purpose of defeating or delaying creditors, that "when proved by parol they render *wholly inoperative* the formal transactions which have been adopted for such purposes by the parties." In *Drinkwater* v. *Drinkwater*, 4 Mass. Rep. 357, Parsons, C. J., speaks of such conveyances as being void against creditors. And such is the law touching this matter. It would be no discouragement to such practices, if the party grantee could avail himself of all his claims, after the legal fraud should have been detected, as he might have done, if he had not joined or aided in such an unlawful attempt, but had taken a conveyance only for the security of his own debt, or for other lawful purposes. But upon the principle contended for, the party to such a conveyance would reason thus: "If the conveyance shall be established, I shall save my own debt and enable my friend to cover up his property from his creditors; if it shall be avoided only in part, I shall notwithstanding save my debt; I will therefore help my friend to lock up his property from attachment, as in no event am I to be prejudiced by doing so." Besides, such a course as is contended for would subject the creditor to suffer from the inability of the grantee to pay, as well as from a want of integrity in his answers upon the process of foreign attachment, when but for his interference a perfect security might be had by attaching the property. The creditor must not only be subjected to the chance of losing by the insolvency, but also by the dishonesty of the party chosen by the debtor to be his trustee. We speak now of the

general operation of such a rule, and not intending in the least degree to impute any moral turpitude to the plaintiffs in the case at bar. We do not believe there was any.

We are disposed to adopt the reasoning and language of Mr. Chancellor Kent, in the case before cited (2 Johns. Ch. Rep. 582), that the grantee "ought not to be permitted to avail himself of any advantage over the other creditors under an assignment fraudulent on its face." "If the assignment was void as against the general creditors, the title of the defendant (the grantee) to the property which he received under it fails. He came by it wrongfully, and to permit him to hold it, by setting off his own debt against it, would be giving effect to a transfer condemned in law."

This rule does not at all affect a case where a conveyance of personal property is made of greater value than is sufficient to pay the debt of the vendee, but without any intent which the law deems a fraud upon creditors. In such case the property passes. So it was decided in *Burlingame* v. *Bell* above cited.

For the reasons above given we are all of opinion that the judgment must be for the defendant.

Motion to take off the nonsuit overruled.[1]

RUSSELL *v.* WOODWARD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1830.

[*Reported* 10 *Pick.* 408.]

REPLEVIN. At the trial, before *Morton*, J., it appeared that the defendant, a deputy sheriff, had taken the property replevied, on a writ of attachment in favor of Dan Wilmarth against Nathaniel Wheeler, the property at the time of the attachment being in the actual possession of Wheeler.

The plaintiffs (who were four in number) claimed the property by virtue of a prior assignment made to them by Wheeler, by an indenture, between Wheeler of the first part and the plaintiffs of the second part. By the indenture, Wheeler, in consideration of the covenants on the part of the plaintiffs therein contained, assigns to the plaintiffs certain real and personal estate and choses in action, in trust to sell and dispose of the same, or such part thereof as they may see fit, at such times and on such terms and at such prices as may seem to them most expedient, and out of the proceeds, after deducting necessary expenses

[1] And see *Mackie* v. *Cairns*, 5 Cowen, 547 (1825).

On all questions concerning assignments for the benefit of creditors, consult Burrill on Assignments (5th ed.).

and a reasonable compensation for their own labor, to pay all and every of the creditors of Wheeler in ratable proportion to the debt of each, without preference, so far as the funds will go, and the surplus, if any, to hold to Wheeler's use; — and the plaintiffs accept the trust, and covenant, each for himself, that they will faithfully execute the trust, and that Wheeler shall be permitted to use and occupy the property so conveyed, committing no waste thereon, until such time as the same shall be sold or disposed of in the due execution of the trust.

The indenture was recorded in the registry of deeds, on the day of its date.

It was objected that the assignment was void for want of consideration, and on account of the clause which permitted Wheeler to remain in possession of the property until the plaintiffs should take possession thereof to execute the trust; but the objections were overruled.

It was also objected, that the assignment was fraudulent, inasmuch as the plaintiffs had not proved that they were creditors of Wheeler; whereupon evidence was given that Russell and Vickery, two of the plaintiffs, were creditors at the date of the assignment, though the amount of their debts was small in comparison with the property assigned; but the judge suggested that the burden of proof on this point was upon the defendant.

The jury found a verdict for the plaintiffs. If either of the foregoing directions and decisions was incorrect, a new trial was to be granted.

W. Baylies and *W. A. F. Sproat*, for the defendant.

C. G. Loring, for the plaintiff.

The opinion of the court was afterwards drawn up by SHAW, C. J. Were the validity, effect and operation of a trust assignment, made by a failing debtor, for the avowed purpose of providing for the disposition of his property, and making a ratable distribution of the proceeds among his creditors, upon general principles of law, equity and expediency, so far as a court of law can properly take into view considerations of expediency, now for the first time drawn in question, the able argument of the plaintiffs' counsel maintaining the ground, that the assignment in question vested the whole of the assigned property in the assignees, so as to bind all creditors and bar the right of attachment, whether the creditors generally, or creditors to any particular amount, had become parties to it or not, would certainly be entitled to great consideration. But this court is not now at liberty to regard these as open questions. In the absence of a general bankrupt law, a series of judicial decisions has taken place upon this subject, extending over a period of nearly thirty years, founded upon the principles of law and equity, and the nature and extent of remedies as they existed at the times of these respective decisions, by which a system of rules of conduct and action, especially among the trading community, has been established, at least so far as such system can be established by judicial decision and precedent. Under this system, and in reliance upon it, contracts and transfers have been made, rights and remedies

acquired, to a large extent; and it would be inconsistent with the plain principles of justice now to disturb them, or to change the law, in any other mode than by a legislative Act, which should look only to the future, and guard by adequate provisions, all acquired and existing rights.

This system recognizes the right of a creditor to attach the personal property of his debtor on *mesne process*, and to hold it as security for such judgment as he may recover, being a right founded upon early colonial laws, and uniformly practised upon in this commonwealth. It also recognizes the right of a debtor to give a preference to one or more of his creditors; and by agreement with him or them, to transfer a portion or the whole of his property to them in satisfaction of a subsisting debt, or as an indemnity against a subsisting suretyship or other liability. Such property may consist, either in real or personal estate, or securities, or *choses in action*.

It is but a slight extension of this rule, that as the debtor may convey property to one or more of his creditors, in satisfaction of their debts, so he may convey to a third person, appointed by such creditors and for their use, or appointed in the first instance by the debtor, if the creditor afterwards assent to and ratify such appointment. Or the assignee may stand in both characters, acting for himself to the extent of his own debt, and as a depositary and trustee for others, by their appointment or assent.

But if under a pretence of a conveyance for the benefit of creditors, the debtor transfers his property upon any secret trust for himself, if it is attended with any of the known badges of fraud, not satisfactorily explained or removed, the conveyance is void at law. As the transaction imports upon the face of it, that the grantor is insolvent, any voluntary or gratuitous conveyance or conveyance without an adequate consideration, is void as against creditors.

From these views of the law, as settled by a series of decisions, it is manifest, that in order to maintain a conveyance to trustees, by a failing debtor, for the benefit of creditors, against an attachment of a creditor not a party to such assignment, it must appear that the assignment was made upon a valuable and adequate consideration, and in good faith, to satisfy or secure real existing debts, or to indemnify against actual and subsisting liabilities; and as it appears, by the recitals and terms of such assignment, that the grantor is insolvent, and that no actual consideration in money or other equivalent, is paid by the grantees, such consideration must consist in the faithful application of the assigned property to the payment and discharge in part or in whole, of the assignor's debts and liabilities, or in an acceptance of the same in satisfaction, by the creditors and sureties to whom or to whose use it has been conveyed; it must appear that such conveyance has been accepted in payment or satisfaction, by such creditors and sureties, in order to make such transfer complete and available against attaching creditors.

It has been argued in the present case, that as the assignment does not in terms require the creditors, by becoming parties to it, to release their debts, or take upon themselves any other onerous condition, and as the assignment must of necessity therefore operate as a benefit to them, their assent is to be presumed. But the court are strongly inclined to the opinion, that this circumstance of not executing a release, makes no substantial difference, and therefore that in conformity to a series of decisions, it must be held, that the assignment of the whole or the bulk of an insolvent debtor's property, to assignees selected wholly by himself, and without the knowledge of the creditors, in trust to dispose of the same upon such terms as the debtor alone thinks fit to impose, and to distribute the proceeds among the creditors, does not appear to be so plainly beneficial to them as to come within the principle relied upon in the argument, upon which their assent is to be presumed. It must be considered that by assenting to and affirming such assignment, the creditors do in effect consent that the whole of such insolvent's available property, instead of being applied to the satisfaction of their debts, according to the rules of law, and under the direction of the creditors themselves, shall go into the hands of a stranger, appointed by the debtor, and under his direction. We think it would be difficult to presume without proof, that the creditors have assented to an arrangement which thus defeats their legal remedies, especially against a creditor, who by bringing his suit and attaching the property, has expressed his dissent from, and disaffirmance of the assignment.

But this point does not necessarily arise in the present case. It does not appear that there were creditors whose debts would be sufficient to absorb the assigned property, even if their assent, without their becoming parties, could be presumed. It appeared in evidence, that a large amount of property was assigned, and that the amount due the assignees and those whom they represented, was small. In this state of the evidence, it was ruled, that the burden of proof was upon the defendant to impeach the consideration, as being fraudulent against creditors. Such is undoubtedly the rule, in ordinary cases of the conveyance of property, impeached on the ground of being intended to delay or defeat creditors and fraudulent upon that ground.

But for the reasons before stated, a different rule prevails where the assignment, on the face of it, purports to be made by an insolvent debtor to trustees, for the use of creditors, and where the conveyance does not purport to be made upon consideration of money paid. There we think the burden of proof is upon the assignees to show an adequate consideration for the assignment. What is an adequate consideration, depends much upon circumstances which may be extremely various, and in regard to which it is not now necessary to express any opinion.

The court are all of opinion, that in the state of the proof upon the trial of this cause, the suggestion from the court, that the burden of proof was upon the defendant, and that the plaintiffs as assignees,

were under no necessity of proving the existence of their own debts or of the debts of other creditors, as a consideration for the assignment, was incorrect, and therefore that there must be a new trial.[1]

SWIFT *v.* THOMPSON.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1831.

[*Reported* 9 *Conn.* 63.]

THIS was an action of trover for certain articles of machinery used in a cotton manufactory.

The cause was tried at Brooklyn, October Term, 1830, before *Williams*, J.

Both parties claimed title to the property under deeds from Charles Lee. The defendant having indorsed sundry notes for Lee, to the amount of 9,660 dollars, payable at the New London Bank, Lee, to secure the defendant, on the 7th of August, 1829, executed a mortgage to him of three pieces of land on the Willimantic Falls, in Windham, "with a cotton manufactory and all the machinery of every description thereunto belonging." The defendant intrusted the deed, which was taken at New London, about twenty-five miles from Windham, to Lee, who agreed to procure it to be recorded, which he did, on the 14th of the same month. After the execution of this deed, Lee continued in possession of the property therein described, using it as he had done before, until the 15th, when he assigned the same property, with some other real and personal estate, to the plaintiffs, as trustees for his creditors, with full power to sell the property and apply the avails in discharge of his debts, "subject to such claims as the mortgagees legally can have to the same." By a second deed, dated the 18th, he assigned to the plaintiffs all his personal estate not before assigned to them, except such as is by law exempt from execution. At the time when these deeds were executed, Lee was insolvent. Thompson paid the notes so by him indorsed, as they became due.

The plaintiffs claimed, that the machinery was personal property; and that as Thompson had not taken possession of it, the conveyance to him was void. At the time of the execution of the deeds, part of the machinery was in the manufactory in no way attached or secured to the building. Another part consisted of spinning frames, &c., which were standing upon the floor, cleets being nailed to the floor around the feet of such frames to prevent their moving, but no nail or other fastening in any way attached them to the floor or building. To the posts of the residue of the machinery iron plates were attached,

[1] But see *Shattuck* v. *Freeman*, 1 Met. 10 (1840); and generally in the United States, assent of creditors is not necessary. See Burrill Ass. (5th ed.), §§ 284, 285.

through which plates, wood-screws passed, and were fastened into the floor; but by unscrewing such wood-screws, the machinery could be removed, without injury to the building or to the machinery itself.

The plaintiffs claimed, that under the circumstances of this case, the deed from Lee to the defendant was to be considered fraudulent and void; and that the plaintiffs, under the deeds to them, were entitled to hold the property; and prayed the judge so to instruct the jury.

The judge charged the jury, that the machinery was personal property; but though it might have been fraudulently conveyed by Lee to the defendant, yet the conveyance was good as against the plaintiffs claiming under said deeds to them; and directed the jury to find a verdict for the defendant. This was accordingly done; and the plaintiffs moved for a new trial for a misdirection.

Strong and *J. W. Huntington*, in support of the motion.

Goddard and *T. S. Perkins*, contra.

DAGGETT, J. There were two principal questions raised and discussed at the bar, and decided by the judge at the circuit, and which are now to be examined.

1. Was the property described personal or real? The judge declared it to be personal. If any part of it be real, it is very clear, that no recovery can be had for such part. I think the decision of the judge thus far correct. It consisted of various articles of machinery belonging to a manufactory of cotton cloth; which, with their connection with the buildings, are particularly described in the motion. Beyond a doubt these articles are in no respect real estate, except as they are attached to the freehold. It is material here to observe, that an important part of the description is, that they were thus attached to the building to render them stable, but that they might be removed to any other part of the building, or to any other place, without any injury to the freehold. To operate successfully, they must be fixed, like clocks, and many other articles, which are clearly personal and movable. We resort, then, to the criterion established by the rules of the common law: could this property be removed without injury to the freehold? The case finds this fact. This then should satisfy us.

But we will look at it more closely. This question has arisen and been decided in three classes of cases. 1. Between the executor and heir; and there it is considered favorably to the latter, upon a familiar principle of the common law, viz. that the heir is to be favored. 2. Between the executor of the tenant for life and the remainder-man or reversioner. 3. Between landlord and tenant; and here the greatest indulgence is shown to the tenant, especially where the annexations are for the support of trade and manufactures. *Elwes* v. *Maw*, 3 East, 38; 2 Kent's Comm. 279, 280. But in *Cresson et al.* v. *Stout*, 17 Johns. Rep. 116, and in *Gale* v. *Ward*, 14 Mass. Rep. 352, articles of this description were declared to be personal property. The same principle is necessarily implied in *Bostwick* v. *Leach*, 3 Day, 476. In no court, within my knowledge, have they been deemed otherwise.

The argument *ab inconvenienti* may also be entitled to some consideration, both as it respects debtor and creditor. If a spinning machine be real estate, a part of it might be set off, by metes and bounds, in satisfaction of a small debt. I entertain no doubt on this point.

2. The great point remains to be considered. Was this bill of sale valid, possession not accompanying or following it? The judge at the circuit charged the jury, that though this property was fraudulently conveyed by Lee to the defendant, yet the conveyance was good against the plaintiffs claiming under the deed from Lee, and therefore their verdict ought to be for the defendant. This part of the charge I think erroneous. It might seem, that this charge presents a very narrow inquiry; but as the cause is again to be tried, the broad question whether a sale of personal property by a deed, either absolute or by way of mortgage, be good, unless possession accompany the sale, will be considered and disposed of. In my opinion, if the vendee of personal property suffer the vendor to remain in possession, this is evidence of fraud as against the creditor of the vendor, or a *bona fide* purchaser, be the sale absolute or conditional; and unless there be a sufficient excuse shown to and approved by the court, that evidence is conclusive. In *Edwards* v. *Harben*, 2 Term Rep. 587, it was declared, by the Court of King's Bench, that an absolute bill of sale was a fraud in law, unless possession accompanies and follows the deed. This principle was recognized, in express terms, by the Supreme Court of the United States in *Hamilton* v. *Russell*, 1 Cranch, 309.

The facts in this case, so far as they regard this point, are these. On the 7th of August, 1829, Lee made a deed of the building and machinery, in which the articles in question were then, and had been, for years before, used. This deed was executed at New London, about twenty-five miles from Windham, the place where the manufactory was situated. The defendant then delivered the deed back to Lee, under an agreement that he should, immediately on his return to Windham, procure it to be recorded. Lee remained in possession, using the machinery as his own, until the 15th of August, when he conveyed it to the plaintiffs, and delivered immediate possession, having lodged the deed to the defendant for record, on the 14th. The deed was made to the plaintiffs, as trustees for the creditors of the grantor, with full power to sell the property and apply the avails in discharge of his debts. The deed to the plaintiffs counted upon a mortgage made to the defendant, and declared it subject "to such claims as the mortgagee can legally have to the same." There was no doubt as to the validity of the debts of the defendant; but there was no pretence of any possession by him other than what arose out of the delivery of the deed. Lee, at the date of these deeds, was insolvent.

The condition of the plaintiffs, then, is that of creditors and *bona fide* purchasers. They profess to be, and in truth are, the creditors of Lee; for they represent his creditors; and the deed is, therefore, of the same force as though made to the creditors respectively by name.

They have the same rights, then, as they would have, if they had obtained executions, and executions had been levied on this property. They are, therefore, entitled to all the rights, which Lee could transfer to them and whatever could be taken by execution, that is, to his interest in those chattels. They are also *bona fide* purchasers, by all the rules which apply to this subject. They receive this property to sell, and apply the avails in payment of his debts. They are, then, creditors, and *bona fide* purchasers. *Minor* v. *Mead et al.*, 3 Conn. Rep. 289; *Kimball* v. *Hutchings*, 3 Conn. Rep. 450; *James* v. *Johnson*, 6 Johns. Chan. Rep. 417.

The simple and intelligible rule of law laid down in *Edwards* v. *Harben* and *Hamilton* v. *Russell*, above cited, would seem to settle this case. But it is admitted, that this rule has been repeatedly broken in upon, in Great Britain and in this country. The exceptions have become so numerous (by one respectable court they are declared to be no less than twenty-seven in number) that they seem rather to abrogate than establish the rule. It may be doubted whether the principle is not sound, and whether many of its modifications do not tend to promote, rather than to suppress, fraud.

The doctrine of this court, as established in *Patten* v. *Smith*, 5 Conn. Rep. 196, is, that a sale of goods and chattels, either absolute or by way of mortgage, with an agreement either in or out of the deed, that the mortgagor shall remain in possession, except in special cases and for special reasons, to be shown to and approved by the court, is fraudulent and void against creditors and *bona fide* purchasers. This has been the law of Connecticut for the last forty years, if not from the beginning. It is not according to the course of the court to call this a fraud *per se*, and to direct the jury to find the sale void, but the question of fact, with instruction that if they find none of the established exceptions, they will find the transaction fraudulent. I see no good reasons to depart from these principles.

Let us now attend to the objections urged against the claim of the plaintiffs.

First, it is urged, that the plaintiffs had notice of the mortgage to the defendant, and that too of the specific claim of the defendant. This notice, however, could have no effect; for if they knew of the prior conveyance, they knew also, that the vendor remained in possession, using the property as his own, and as he had been using it years before; and they therefore knew, that the sale to the defendant, so far as it related to the personal property, was void. All the authorities are one way on this point. *Doe* d. *Otley* v. *Manning*, 9 East, 59; *Doe* d. *Watson et al.* v. *Routledge*, Cowp. 705, 711, 712; *Chapman* d. *Staverton* v. *Emery*, Cowp. 278, 280; *Gooch's Case*, 5 Rep. 60; *Reed* v. *Blades et al.*, 5 Taunt. 212; *Waterhouse* v. *Benton*, 5 Day, 136. There is no difference as to this question, whether it is a fraud in fact, or whether the fraudulent intent be inferred, and therefore a fraud in law. If a creditor knows, that personal property has been attached or

taken by execution, or sold and paid for, and is in possession of the debtor by design, he may attach the property, levy his execution and sell it, or take a bill of sale of it in discharge of his debt; or even a person not a creditor may safely buy it; for the transaction, there being nothing more in the case, is fraudulent and void.

Secondly, the nature of this property, it is urged, forbids the taking of possession by the vendee. Why? it may be asked. The case finds, that it can be removed without injury to it or the building. It may be employed in another building occupied as a cotton manufactory, or it may be sold.

It is again said, that the owner of the building will find it useless, without machinery. Nor can a hotel be sucessfully occupied without furniture; nor a farm, without utensils and stock; nor a theatre, without dresses and scenery: but who would contend, that all such property might be sold, and the vendor retain possession consistent with the rule of law? In *Reed* v. *Blades et al.*, 5 Taunt. 212, a conveyance was made by mortgage of a leasehold building occupied as an opera house; and in the same instrument the dresses, scenery and decorations were conveyed. The conveyance of the leasehold property was holden good; but of the chattels, no possession accompanying it, the deed was holden void. I entertain no doubt on this point.

Thirdly, it is insisted, that this conveyance to Lee is by way of mortgage, and that in such case, it is consistent with the deed that the property shall remain with the vendor. It is no part of the deed that possession should remain; nor is there any suggestion of any such agreement out of the deed. If this deed, then, be good because conditional, then it is so in all cases where it is conditional; but there can be no authority for such a position. In *Ryall et al.* v. *Rolle*, 1 Atk. 165, and in *Worseley et al.* v. *De Mattos et al.*, 1 Burr. 467, it was declared, that there was no difference between an absolute deed and a mortgage, where the vendor remained in possession; they are equally fraudulent. It may be said, that these cases were under the Bankrupt Act of 21 Jac.; but the whole reasoning of the court was in opposition to such conveyances as fraudulent and void, by the Statute of 13 Eliz. and by the common law. The mortgagee can take possession of mortgaged goods; and there is no reason why he should not, except in special cases, to procure a collusive credit. No special reason is assigned, in this case, why the mortgagor appears and acts as owner. He may impose upon mankind, by false appearances, obtain new credit, and mortgage the property a hundred times over. Bills of sale are never recorded, unless where goods or chattels are embraced in the same deed with the land; nor can they, in such case, be constructive notice; for this is true only of *deeds* required to be recorded, as was decided recently in Middlesex County, in the case of *Carter* v. *Champion et al.*, 8 Conn. Rep. 550.

In the case of *Cadogan* v. *Kennett*, Cowp. 432, it was part of the trust on the face of the deed, that goods conveyed to the trustees for

the use of the husband, and then to his wife, in consideration of marriage and the marriage portion, should remain in possession of the husband; and the transaction being fair, the court held, that they were not liable to an execution of a creditor existing at the time of the deed. It was part of the trust, that the goods should remain in the house.

The doctrine of *Riall et al.* v. *Rolle* and *Worseley et al.* v. *De Mattos et al.* was recognized, by the Supreme Court of Massachusetts, in *The Portland Bank* v. *Stubbs*, 6 Mass. Rep. 422. That was a pledge of personal property. Parsons, C. J., calls it a mortgage, and says, that a delivery of the chattel is essential. The same principle was established in *Reed* v. *Blades et al.* above cited.

But I forbear to cite authorities. As late as 1824, in the case of *Patton* v. *Smith et al.*, this court declared, that in a mortgage or in an absolute sale, if the possession remained in the vendor, it is fraudulent, unless explained. It will not be said, that this case is within any exception ever recognized by this court (and I am not aware by any other); and therefore it is within the rule. The doctrine is illustrated, and all the cases reviewed with great ability, and in a satisfactory manner, in 2 Kent's Comm., 406 to 419.

Fourthly, it only remains to consider an objection arising out of the fact, that Lee could convey only what remained in him; and as his deed to the defendant was upon a good and sufficient consideration, it is said, nothing remained in him to assign to the plaintiffs. This has been already adverted to under another head. I would further observe, that the only cases cited in support of this objection bear not at all on the point. In *Bean* v. *Smith et al.*, 2 Mason 252, and *Astor* v. *Wells et al.*, 4 Wheat. 466, it was decided, that a *bona fide* purchaser *without notice*, from a grantee to whom property had been conveyed to defraud creditors, is entitled to hold the same against the creditors of the grantor. These decisions are opposed to the doctrine of this court, in the case of *Preston* v. *Crofut*, 1 Conn. Rep. 527. It was holden, in that case, that the first deed being void under our Statute, gave no title; for there was nothing in the grantee to convey. But, it is not easy to see any application of either of these principles to this case.

The plaintiffs took this deed knowing of the prior mortgage; and they also knew, that it was void, because Lee remained in possession using it as his own, and as he had used for years. The deed to the defendant, then, was fraudulent. The law will not stop to inquire whether there was actual fraud or not; but will infer it at all events; for it is against sound policy to suffer the vendor to remain in possession, whether an agreement to that effect be, or be not, expressed in the deed. 2 Kent's Comm. 412. The same doctrine is established in *Doe* d. *Otley* v. *Manning*, and in Rob. Fraud. Con. 39, 40. Had this deed to the defendant been made with an express intent to defraud the creditors of Lee, it could not stand in the way of the plaintiff's deed; nor can it, being fraudulent in law. There is no difference.

Let there be a new trial.

HOSMER, C. J., and PETERS and BISSELL, JJ., were of the same opinion; the latter having expressed some doubt as to the condition in which the plaintiffs stood.[1]

GROVER *v.* WAKEMAN.

COURT OF ERRORS OF NEW YORK. 1833.

[*Reported* 11 *Wend.* 187.]

APPEAL from chancery. This was a bill filed by the respondent, a creditor, to set aside as fraudulent a *voluntary assignment* made by Grover and Gunn, his *debtors*, of all their estate, for the purpose of having the same disposed of, and the proceeds applied in payment of their debts *in the manner designated by the deed of assignment;* the trustees to whom the property was assigned to account for the surplus, if any, to the assignors. Grover and Gunn were merchants in Auburn, and being *insolvent*, they, on the 1st July, 1826, executed a deed of assignment of their stock of goods on hand, debts, credits and other property specified in schedules attached to the conveyance, to three individuals *upon trust:* to convert the property into money, and to collect the moneys due and to grow due, and after deducting all proper charges in the execution of the trust, first, to apply the proceeds and avails in satisfaction of the debts due and owing by Grover and Gunn, or *either* or *both of them*, to certain persons named in a schedule, and designated as *class number one*, "in the order and manner following, to wit: the debt to the creditors first named, in the first place, and then all the remaining creditors named in *class number one* proportionally, according to the amount of their respective debts." (The creditors *first named* were John H. Beach and Ebenezer S. Beach, the amount of the indebtedness to whom was stated at $1,750, and to have originated in indorsements of Grover's notes, for the benefit of a firm in Albany.) Second. From the surplus avails to pay to such of the creditors of the assignors as were named in the same schedule, and designated as *class number two*, who should, within three months after being required in writing by the trustees so to do, agree in writing under seal to receive from the trustees such proportion of their debts respectively, as could be paid by the avails then remaining in the hands of the trustees, in full discharge of their respective claims and demands against Grover and Gunn, or either of them, the whole of their respective debts or such proportion thereof as the surplus avails would pay — to be apportioned among the creditors of *class number two*, according to

[1] WILLIAMS, J., dissented on the ground that the plaintiffs were neither creditors nor purchasers for value. His opinion is omitted.

And see *Clow* v. *Woods*, 5 S. & R. 275 (1819).

the amount of their respective debts. Third. After paying the creditors in the above order the residue of the avails were directed to be applied, so far as the same would extend, to the payment proportionably, of debts due to certain other creditors designated in the same schedule as *class number three*, according to the respective amounts of such debts; *and of all other debts* justly due and owing by Grover and Gunn, to be proven to the satisfaction of the trustees. Fourth. The surplus avails, if any, to be accounted for and paid over to the assignors. Which declaration of trust concluded with a *provision* that the trustees should have full liberty and leave to compound with any or all of the *creditors*, in such manner and upon such terms as they should deem proper, so, however, as not to interfere with or depart from the *order of preference* specified in the deed of assignment. The respondent, a creditor of Grover and Gunn, to the amount of about $3,000, and included in *class number two* of creditors specified in the schedule attached to the assignment, filed his bill, charging the assignment to be fraudulent in law. Grover and Gunn put in their answer, as did also the trustees, from which it appears that at the time of the assignment Grover and Gunn were indebted in about the sum of $65,000; that the amount of debts due to their creditors in *class number one* was $38,530; that the amount of moneys received by the trustees from the sales of property and the collection of debts was $15,723,$\frac{95}{100}$; and that there remained in the hands of the trustees, of debts and choses in action, about $28,000, of which sum $6,000, and perhaps $7,000, were supposed to be good and collectible, and the residue bad. The trustees stated, that *before* the filing of the complainant's bill, they had *paid over*, in execution of their trust, $11,000, and *retained* in their hands about $5,000, to be applied in like manner, subject to a deduction for their expenses and charges. The defendants, in their answers, deny that the assignment is fraudulent in law, or was made with a *fraudulent intent*, or that the legal effect thereof is to delay, hinder and defraud the creditors of Grover and Gunn. There is nothing definite in the answers to show that the debt to the Messrs. Beach, the creditors first named in *class number one*, was the *individual debt* of *Grover*, or the debt of the *firm* of *Grover and Gunn*, secured by the individual note of Grover; the fact is left in uncertainty. The complainant filed a general replication; no proofs were taken, and the cause was submitted to the Chancellor upon bill and answers; the counsel for the parties presenting written arguments. In December, 1832, the *Chancellor* decreed the assignment to be fraudulent and void, as to the complainant, and set the same aside; and ordered a reference to a master, to ascertain the amount due to the complainant, and that an account be taken of all the property and effects assigned to the trustees which had come to their hands, or for which they should be justly accountable; instructing the master, in the stating of the account, to allow the trustees all payments made by them to the creditors of Grover and Gunn, previous to the filing of the complainant's bill, and also their necessary expenses and disbursements in col-

lecting and converting into money the property and effects assigned; and gave leave to the trustees to pay into court the balance of moneys remaining in their hands. From this decree the defendants below appealed.

S. A. Talcott and *B. F. Butler*, for the appellants.

D. Lord, Jun., and *S. A. Foot*, for the respondent.

Mr. Justice Sutherland. The question to be decided in this case is whether the assignment made by Grover and Gunn, on the 1st day of July, 1826, is fraudulent and void upon its face, as being calculated and intended, in judgment of law, to delay, hinder, and defraud their creditors, in the prosecution and collection of their debts. The most important objection made to the assignment, grows out of the condition attached to the payment of the creditors named in class No. 2. The assignees are directed, after discharging the debts due to class No. 1, to apportion whatever surplus may remain, among such of those named in class No. 2 as will agree in writing under seal to receive what may fall to them upon such apportionment, in full discharge of all their claims and demands upon the assignors. The residue of the avails, if any, are then to be applied to the payment of the debts due to the debtors in class No. 3, *and of all other debts justly due and owing by the assignors,* to be proven to the satisfaction of the assignees; and if any surplus shall then remain, it is to be paid over to the assignors.

It was contended by the complainant in the court below, the respondent here, that such of the creditors in class No. 2 as shall refuse to come in and discharge the assignors, upon the terms there offered them, are entirely excluded from all benefit from the assignment; that if there should be a surplus after paying all the other creditors, according to the terms and spirit of the instrument, the assignees could not pay it to them, but must pay it to the assignors themselves. Upon a careful consideration of this instrument, and applying to it the ordinary rules of interpretation, I do not think that such is its necessary or just construction. The debts of the first class are first to be paid; then an apportionment is to be made among the debts of such of the second class as will accept what may then fall to them, and give absolute releases. The residue, if any, is then to be applied to the debts of class No. 3, and to all *other debts* justly due and owing by the assignors. Other than what? Why, obviously, other than those for the payment of which provision had already been made. But no provision had been made for those of class No. 2, who should refuse to accept their distributive shares and give releases. They fall, therefore, in my opinion, within the terms of the residuary clause, and would be entitled to be paid under the assignment, if the fund should be sufficient for that purpose. A fraudulent intent is never to be presumed; and where an instrument is ambiguous in its terms, and admits of two constructions, that interpretation should be given to it which will render it legal and operative, rather than that which will render it illegal and void. It was supposed that the provision that these residuary debts should be proven to the

satisfaction of the assignees, tended to show that none of those enumerated in class No. 2 could have been intended to be covered by the residuary clause, because the assignors had, on the face of the assignment, admitted those to be valid and existing debts; and of course, if those were the debts intended to be covered, they would not have imposed on their assignees the useless duty of exacting and receiving proof in relation to them. This suggestion is susceptible of two answers. In the first place, there may have been many other debts not enumerated, and in relation to which it would have been necessary and proper to require proof; and in a provision of this description, a party would naturally employ general and comprehensive terms, although they might embrace some cases in relation to which the provision was superfluous. But, secondly, upon adverting to the schedule, which contains class No. 2, it will be perceived that many of the debts there enumerated, are stated by estimation only. Of the $34,000 embraced in that class, more than one-fourth, or about $9.000, are debts of that description. In relation to them, it was proper and necessary to exact proof, as there was no liquidation or admission of their amount; and in relation to those that were specifically stated in the schedule, the schedule itself would probably be sufficient evidence to justify the assignees in receiving them. I entertain no doubt, therefore, that under this assignment, such of the creditors of the second class as should refuse to accept their shares of the property assigned in full satisfaction and discharge of their debts, were not absolutely excluded from the benefit of the assignment, but only postponed to a subsequent class.

Having thus settled the character and construction of the assignment, the question recurs, whether it is void on account of the condition on which it makes the preference given to the creditors of the second class to depend. to wit, an absolute discharge of their debts. It is perfectly settled, both in England and in this country, that a debtor in failing circumstances has a right to prefer one creditor or set of creditors to another, in all cases not affected by the operation of a bankrupt system. He may assign the whole of his property for the benefit of a single creditor, in exclusion of all others; or he may distribute it in unequal proportions, either among a part or the whole of his creditors. No matter how or upon what principles the distribution is made, if the debtor devotes the whole of his property to the payment of just debts, neither law nor equity inquires whether the objects of his preference are more or less meritorious than those for whom he has made no provision. 3 Maule & Selw. 371. 4 Mason, 210. 5 T. R. 235. 6 Id. 152. 8 Id. 521. 4 East, 1. 2 P. Wms. 427. 1 Atk. R. 95, 154. 2 Johns. Ch. R. 283. 3 Johns. R. 71. 5 Id. 385. 1 Binn. 502. 10 Mod. 489. 5 T. R. 424. 15 Johns. R. 583. 5 Cowen, 547. The right to prefer may originally have been sustained in part upon the supposition that just and proper grounds of preference did in most cases exist, and would be duly regarded by the debtor; but whatever may have been the reason or foundation of the rule, it is one of

that numerous class of cases in which the rule has become absolute, without any regard to the fact whether the reason on which it was founded exists or not in the particular cases. It is now too late to agitate the question, whether these assignments, either partial or general, are sustained by considerations of true wisdom and policy. Reflecting men have differed upon that subject; but the better opinion seems to be, that in the absence of a general bankrupt system, the interests of a commercial community require that they should be sustained. They have accordingly grown into use, and have been sanctioned by judicial decisions in most of the States of the Union. They have become thoroughly incorporated into our system; and all that it is now competent for our courts to do, is to see that they fairly appropriate all the insolvent's property, or such portion of it as he undertakes to assign, to the payment of his just debts, and are not made the instruments of placing it beyond the reach of his creditors, and for the benefit, either immediate or remote, of the insolvent himself. Whenever they depart from the simplicity of a direct and unequivocal devotion of the property of the assignor to the payment of his debts, and contain reservations and conditions, intended for his ease and advantage, they are viewed with considerable, and I think I may add, in view of the course of judicial decisions in this State, with increasing distrust.

The precise question now presented to us has never been decided in this State. In *Hyslop* v. *Clarke*, 14 Johns. R. 458, *Austin* v. *Bell*, 20 Id. 442, and *Seaving* v. *Brinckerhoff*, 5 Johns. Ch. R. 329, it arose in connection with other circumstances which had more or less influence in the decision of those causes. *Hyslop* v. *Clarke* was an action of trespass, brought by the assignees of Barnet and Henry against a judgment creditor of the assignors, who had caused an execution to be levied upon their property notwithstanding the assignment. The plaintiff claimed the property under the assignment, and the defendants contended that the assignment was void, and did not pass the property out of the assignors. The trusts declared in that case were, 1. To pay a certain debt due to the assignees; 2. To pay all the other creditors of the assignors in full, if the property should be sufficient; if not, then ratably, provided they should *severally* and respectively discharge the assignors from all further liability for their debts; but if the creditors or *any of them* should refuse to give such discharge, then the second trust was to become void, and the trustees were directed not to execute it. They were, then, 3dly, after paying the debt of Hyslop & Co., the assignees, to hold the residue in trust to pay the whole of the avails to such of the creditors of the assignors as they should appoint, as soon as such refusal should be known to them; and 4. To pay the residue to the assignors. Here, as was remarked by Judge Van Ness, the assignment did not actually give a preference to any of the creditors, except Hyslop & Co.; but it was an attempt on the part of the debtors to place their property out of the reach of their creditors, and to retain the power to give such preference at a future time, upon their own

terms and conditions. The trust for the benefit of all the creditors ceased whenever *any one* of the creditors refused to come in on the terms prescribed, and the property was then held in trust for the assignors themselves; and as the creditors could not reach it at law, if the assignment was valid, so Judge Van Ness held that they could not effectually reach it in equity. For if any one should file a bill to compel the assignors to make a new declaration of trust, as the power reserved was to select whom they pleased, if a decree should be made ordering a new declaration, the assignor might exclude the very creditor who had filed the bill. Under such circumstances, no creditor would ever file a bill. That assignment, then, differed from the one now under consideration in two essential particulars: 1. It reserved to the grantor a right subsequently to control the property by appointing new uses; and 2. The power of any one creditor effectually and beneficially to compel such declaration, was exceedingly doubtful, if not impossible. The weight which these circumstances had in the decision of the cause may be subsequently considered. The case of *Murray* v. *Riggs*, 15 Johns. R. 571, shows that the control over the property which the assignor there reserved was of itself sufficient to avoid the deed. In *Austin* v. *Bell*, the assignment contained a reservation of $2,000 per annum for a limited time to the assignor. It also exacted from the creditors who were to be benefited by it a general release; and it then provided, that if any of the creditors named should not within a limited time become parties to the assignment, and thereby discharge the assignor, that the *assignees* should then pay to the *assignors* the proportion which would otherwise have gone to such creditors; and it was on this ground principally that the assignment in that case was held void. The provision for the grantors themselves, was then supposed to have been sanctioned by the court in *Murray* v. *Riggs*; and Ch. J. Spencer put his opinion mainly on the ground, that by the provision of the assignment, the shares of such of the creditors as should refuse to execute it, were to revert to the grantors for their own private benefit and use. In *Searing* v. *Brinckerhoff*, the assignment also contained the condition that the creditors who should come in under it, should give a full discharge of their demands; and if any of them refused, their shares were to be held in trust for the *grantor*. Chancellor Kent laid great stress in that case upon the fact that the assignment did not *embrace all the property* of the assignor, and yet exacted a release from his creditors upon a partial payment; he says the condition was oppressive, and without any color of justice in this case, inasmuch as the assignment was not general of all the property, but only of a specified part; a partial assignment upon such a condition is pernicious in its tendency, if it be not fraudulent in its design; and in relation to the resulting trust, he remarked that a power of coercion over the creditor, with the reservation of such a resulting trust to the grantor in case the coercion should not be successful, was deemed by the Supreme Court, in

Hyslop v. *Clarke*, to be a badge of fraud, and not a fair and lawful assignment.

But although it is not adjudged in any of these cases that an assignment is fraudulent and void, which merely makes the *preference* given to creditors to depend upon their releasing the grantor, but which at all events devotes the whole property to the payment of his debts without any reservation for his own private benefit; still, it cannot be contended that they sanction, with anything like the authority of a judgment, the contrary doctrine. I am inclined to think that the weight of professional opinion in this State has been in favor of the validity of such assignments; but that, so far as it depends upon our own adjudications, the question is still open, and may now be settled by this court upon principle.

Very few cases are to be found upon this subject in the English books; and whenever the question has arisen there, it has generally been upon composition deeds, to which the creditors were parties; or has been more or less affected by considerations growing out of their bankrupt system. 4 T. R. 166. 8 Id. 521. In the case, however, of the *King* v. *Watson*, 3 Price 6, in the Exchequer Chamber, it must be conceded that the objection to the assignment which we are now considering, existed and was urged against its validity, and that the objection was overruled; there, however, as in the other cases, the principal question was whether the assignment was not void under the bankrupt laws. The case, however, is a very bald one, and is entitled to very little weight as authority. The opinion is exceedingly brief, and refers to no cases.

This question has several times been under the consideration of the Supreme Court of Massachusetts; but it has generally, if not always, been so connected with other objections to the assignment, that it is exceedingly difficult to say, upon a review of all those cases, what the judgment of that court would be upon the naked and insulated point which we are now considering. *Hatch* v. *Smith*, 5 Mass. R. 42. *Widgery* v. *Haskell*, 5 Id. 144. *Ingraham* v. *Geyer*, 13 Id. 146. *Hastings* v. *Baldwin*, 17 Id. 552. *Harris* v. *Sumner*, 2 Pick. 129. Judge Story had occasion to consider these cases in *Halsey* v. *Whitney*, 4 Mason, 229, which was decided in October, 1826, and the conclusion which he deduced from them was, that this precise point was not directly decided in any of them. He observed that there were intimations in several of these cases, which would justify a doubt whether the court were prepared to admit the validity of such a stipulation, while in others which contained a similar provision no objection was taken to it by the counsel who argued them, or by the court in their judgment. His conclusion on the whole was, that the point was not judicially settled in Massachusetts. In that opinion he is sustained by Chief Justice Parker, who, in *Borden* v. *Sumner*, 4 Pick. 265, which was decided in the same month with *Halsey* v. *Whitney*, obviously considered the question as still open, and declined expressing any definitive opinion

upon the subject, as it was not necessary to the decision of the cause then under judgment. The subsequent cases of *Andrews* v. *Ludlow*, 5 Pick. 28, and *Lupton* v. *Cutter*, 8 Pick. 298, leave the question in Massachusetts still in the same state of uncertainty. The most that can be said is, that in several of the cases, although the assignment contained this provision, the objection was not taken either by the counsel or the court. Judge Ware, of the U. S. District Court for the State of Maine, in the case of *G. & I. Lord, libellants*, v. *The Brig Watchman*, reported in the 16th No. of the Amer. Jurist, 284, in a very elaborate and learned opinion, in which all the Massachusetts cases are referred to, also came to the conclusion that it was there still an open question.

In Pennsylvania, an assignment containing a stipulation for a release was sustained in *Lippincott* v. *Barker*, 2 Binney, 174. Judge Breckenridge, however, dissented, and Ch. J. Tilghman and Mr. Justice Yeates, whose opinions prevailed, took pains to put themselves upon the particular circumstances of the case. The Chief Justice observed, page 182, "it being, however, to be distinctly understood that my opinion is confined to the circumstances of the present case; for there are many and strong objections to deeds of assignment made without the privity of creditors, and excluding all who do not execute releases." *Vide also Burd* v. *Smith*, 4 Dall. 76.

On the other hand, the Supreme Court of Errors of Connecticut, in *Ingraham* v. *Wheeler*, 6 Conn. R. 277, pronounced an assignment fraudulent and void, solely on the ground that it confined the distribution of the property assigned, to those creditors who should give the assignor a discharge. It was the decisive point in the case, and was fairly met and decided by the court.

The same principle was also decided in Ohio, in *Atkinson* v. *Jordan*, 5 Hammond Rep. 293.

In *Pierpoint* v. *Graham*, 4 Wash. C. C. Rep. 232, Judge Washington sustained an assignment containing this condition. In the District Court in Maine, in the case already referred to, such a condition was held fraudulent. And Judge Story, in *Halsey* v. *Whitney*, 4 Mason, 230, although he came to the conclusion with obvious doubt and hesitation, that the weight of authority was in favor of the validity of an assignment with such a condition, did not hesitate to declare that if the question were entirely new and many estates had not passed upon the strength of such assignments, the strong inclination of his mind would be against their validity. It is very clear that Judge Story, in coming to the conclusion that the weight of authority lay upon that side of the question, inferred it, as Judge Ware has expressed it, not so much from the authoritative decisions of the court, as from the silent acquiescence of the public; not that it had been clearly settled, or distinctly recognized by the judicial tribunals, but that it had slowly ripened into a rule of the common law of Massachusetts, by usage and custom.

There being, then, such a conflict among the authorities, and so much

doubt on which side the preponderance lies, it seems to be not only proper but necessary to consider the question with reference to the general principles involved in it. Every conveyance of property to trustees is, to a certain extent, a hindering and delaying of creditors. It interrupts and presents obstacles to their legal remedies; and every such assignment is absolutely void, if it does not appoint and declare the uses for which the property is to be held and to which it is to be applied. A provision that the uses shall be subsequently declared by the assignor will not do; they must accompany the instrument and appear on its face, in order to rebut the conclusive presumption of a fraudulent intent, which would otherwise arise. But where the assignor parts with all control over the property, and devotes it absolutely to the benefit of his creditors, without any reservation or stipulations for his own advantage, the honesty of his intention is so apparent, and the advantage to the creditors so direct and decisive, that they cannot be said to be obstructed or delayed in their remedies. But where, instead of directly distributing his property among his creditors as far as it will go, he places it beyond their reach by an assignment, not merely for the purpose of saving it from one particular creditor, to be given to another, or to be equally divided among all, but for the purpose of enabling him to extort from some or all of them, an absolute discharge of their debts as the condition of receiving a partial payment, he perverts the power to a purpose which it was never intended to cover, and which the principle on which the right to give preferences is founded, will not justify. Why should a debtor be permitted in this way to operate upon the fears of his creditors and coerce them into his own terms? It has sometimes been said, in answer to this view of the case, that there is nothing immoral or unjust in a debtor in embarrassed circumstances and who is unable to pay all his debts, making the best arrangement in his power with his creditors, and giving the largest dividend or the whole, to those who will settle with him on the best terms; and if he can do this while he retains his property in his own hands, there is no reason, it is said, why he should not be permitted to do it under the cover of an assignment. Parties not under legal disabilities, may make such contracts as they please; and if they are supported by a consideration, and there is no fraud in the case, they will not be disturbed. If a debtor, therefore, with his property in his own hands and open to the legal pursuit of his creditors, can satisfy them that it is for their interest or the interest of any of them to accept 2*s.* 6*d.* in the pound, and give him an absolute discharge, there is no legal objection to it; they treat upon equal terms; the ordinary legal remedies of the creditor are not obstructed. But the case is materially changed when the debtor first places his property beyond the reach of his creditors, and then proposes to them terms of accommodation. He obstructs their legal remedies, hinders and delays them in the prosecution of their suits, by putting his property into the hands of trustees, with the view of getting an absolute discharge from his debts, and exempting his future acquisitions from all

liability. It has been decided in this court, that the reservation of the least pecuniary provision for the assignor or his family, renders an assignment of this description fraudulent and void. How much more valuable is a discharge from his debts or a portion of them to an insolvent debtor, than a temporary pecuniary pittance. Judge Van Ness, in *Hyslop* v. *Clarke*, states what I consider to be the sound principle upon this subject. He says an insolvent debtor has no right to place his property in such a situation as to prevent his creditors from taking it, under the process of a court of law, and to drive them into a court of equity, where they must encounter expenses and delay, unless it be under very special circumstances *and for the purpose of honestly giving a preference to some of his creditors, or to cause a just distribution of his estate to be made among them all.* Judge Spencer, in *Austin* v. *Bell*, and Chancellor Kent, in *Seaving* v. *Brinckerhoff*, obviously concurred in the soundness of that position. Judge Story expressed his approbation of it in *Halsey* v. *Whitney*. The Supreme Court of Errors in Connecticut adopted it in *Ingraham* v. *Wheeler*, and it was most happily and impressively amplified and illustrated by the learned judge of the United States District Court for the State of Maine, in the case to which I have referred.

It is time that some plain, simple, but comprehensive principle should be adopted and settled upon this subject. In the absence of a bankrupt law, the right of giving preferences must probably be sustained. Let the embarrassed debtor therefore assign his property for the benefit of whom he pleases; but let the assignment be absolute and unconditional; let it contain no reservations or conditions for the benefit of the assignor; let it not extort from the fears and apprehensions of the creditors, or any of them, an absolute discharge of their debts as the consideration for a partial dividend; let it not convert the debtor into a dispenser of alms to his own creditor; and above all, let it not put up his favor and bounty at *auction* under the cover of a trust to be bestowed upon the highest bidder. After the maturest reflection upon this subject, I have come to the conclusion that the interests, both of debtor and creditor, as well as the general purposes of justice, would be promoted, if the question is still an open one, by confining these assignments to the simple and direct appropriation of the property of the debtor to the payment of his debts. The remnants of many of these insolvent estates are now wasted in litigation growing out of the complex or suspicious character of the provisions of these assignments. One device after another to cover up the property for the benefit of the assignor, or to secure to him, either directly or indirectly, some unconscientious advantage, has from time to time been brought before our courts and received condemnation. But new shifts and devices are still resorted to, and will continue to be so, until some principle is adopted upon the subject, so plain and simple that honest debtors cannot mistake it, and fraudulent ones will be deterred from its violation by the certainty of detection and defeat. The principle to which I have ad-

verted, it appears to me, if adopted, will, to a very considerable extent, accomplish that object.

But there is another provision in this assignment which it appears to me, it is impossible to sustain. It is that which gives to the assignee full power and liberty to compound with all or any of the *creditors* in such manner and upon such terms as they shall deem proper, so, however, as not to interfere with or depart from the order of preference established in the assignment. The effect of this provision is, as is stated by the Chancellor, to perpetuate the right of giving preferences by vesting in the assignees an arbitrary power in relation to these several classes of creditors, and of compounding with any one upon such terms as they may think proper. I do not see how any other construction can be given to it; it has repeatedly been decided that an assignment which does not declare the uses, but reserves to the assignor the power of subsequently doing it, is fraudulent and void; and if the assignor cannot reserve the power of giving preference to himself, he certainly cannot legally confer it upon his assignee; the same objection in principle exists in both cases.

The next and only remaining objection to the assignment which I shall consider is, that it does not fix the time within which the assignees are to give notice to the creditors in class No. 2, to come in and execute the discharge and receive their dividend. After paying class No. 1, the assignees are to pay the surplus to such of the creditors in class No. 2 as shall, within three months from the time when thereunto in writing requested by them, agree to receive their dividend and execute a discharge. The Chancellor seems to suppose that the assignees, under this provision, may give notice to one of the creditors at one time, and to others at another time, and that each must come in within three months after receiving his notice. When the first comes in, he must execute a discharge, although there is no certainty whether the others will be called upon, or that they will have an opportunity of coming in within a reasonable time. I should incline to the opinion that it was the duty of the assignees to give notice to all the creditors at the same time. But still, the objection remains that that time is not fixed or limited by the assignment, but is left to their discretion; and that the creditors would have no remedy for an unreasonable delay on the part of the assignees, except by a resort to a court of equity. This objection does not strike me with as much force as it appears to have done the Chancellor. Where there is nothing fraudulent or suspicious in the trust itself, and from the nature of the case it is seen to be necessary that some latitude of discretion in relation to it should be given to the assignees, I am not prepared to say that the circumstance, that there is no remedy for an abuse of that discretion, except by a resort to a court of equity, is sufficient to avoid the trust. To a certain extent, that may have been the fact in this case. But where a matter, affecting the rights and interests of creditors, which might and ought to have been made definite and certain, is left to the discretion of assignees, different

considerations arise; and I should incline to the opinion that it would be fraudulent. It is unnecessary, however, to dwell upon this point, as I hold the assignment fraudulent upon the other grounds which have been stated.

I also abstain from any discussion of the question, whether the debt of the Messrs. Beach, the creditors first named in *class number one*, was a debt due from the firm of Grover and Gunn, or was the individual debt of one of them; and admitting it to have been an individual debt, what influence it would have upon this assignment. It is an important question which, I agree with the Chancellor, ought to be settled in a case where there is no dispute about the facts.

I am for affirming the decree below.[1]

After the several opinions delivered in the cause had been read, MR. JUSTICE SUTHERLAND proposed the following *resolution* for adoption: "Resolved, that the *assignment is void*, because it makes the preference given to the creditors of the assignors, designated as class No. 2, to depend upon the condition that the preferred creditors shall give the assignors an absolute discharge of their debts;" and, on the question being put, "Shall this resolution be adopted?" the members of the court voted as follows:

In the affirmative — The PRESIDENT, Chief Justice SAVAGE, Justices SUTHERLAND and NELSON, and Senators ARMSTRONG, BEARDSLEY, CONKLIN, CROPSEY, DEITZ, LYNDE, MACDONALD, SHERMAN, STOWER, TRACY, VAN SCHAICK — 15.

In the negative — Senators EDMONDS, GANSEVOORT, GRIFFIN, SUDAM, WESTCOTT — 5.

And the court accordingly *affirmed* the decree of the Chancellor, the final vote being the same as on the passage of the resolution.[2]

LIVINGSTON *v.* BELL.

SUPREME COURT OF PENNSYLVANIA. 1834.

[*Reported* 3 *Watts*, 198.]

APPEAL from the Circuit Court of Alleghany County, held in November 1833, before *Justice Ross*.

The appellant, Thomas Livingston, assignee of Samuel Stevenson, instituted an action of trover against William Bell, Jun., John Alexander and Thomas Stevenson, the appellees, to recover certain bonds, notes, book accounts and merchandise of the value of 50,000 dollars.

[1] The other opinions are omitted.

[2] A point on the question of costs is omitted.

The plaintiff claimed the property by virtue of an assignment made to him by Samuel Stevenson under and conformably to the insolvent laws, and dated the 24th of November 1832.

The defendants claimed under the following voluntary deed of assignment.

"This indenture, made this 7th day of August A. D. 1832, between Samuel Stevenson, of the city of Pittsburgh, merchant, of the one part, and William Bell, Jun., John Alexander and Thomas Stevenson of the said city, of the other part. Whereas, the said Samuel Stevenson being indebted to several persons in sundry sums of money which he is at present unable to content and satisfy, hath agreed to assign all his estate, real, personal and mixed, in trust for the benefit of all his creditors, in manner hereinafter mentioned. Now this indenture witnesseth, that the said Samuel Stevenson, for and in consideration of the premises, and of one dollar to him in hand paid by the said William Bell, Jun., John Alexander and Thomas Stevenson, the receipt whereof is hereby acknowledged, doth hereby grant, bargain, sell, assign and transfer unto the said William Bell, Jun., John Alexander and Thomas Stevenson, and to the survivor of them, their heirs and assigns, all and singular the estate, goods, chattels, moneys, credits and effects, merchandise and debts, whatsoever and wheresoever of the said Samuel Stevenson, and all securities had, taken or obtained for the same, and all his right, title and interest of, in and to the same. To have and to hold, take, receive and enjoy the property and estate hereby granted and assigned to the said William Bell, Jun., John Alexander and Thomas Stevenson, their heirs and assigns, and to the survivor of them as aforesaid, upon the special trusts, nevertheless, that they the said William Bell, Jun., John Alexander and Thomas Stevenson shall forthwith take possession and seisin of the premises, and within such convenient time as to them shall seem expedient, by public or private sale for the best price that can be reasonably procured, shall convert all and singular the premises into money, and as soon as possible collect all and singular the debts and sums aforesaid, and shall pay and apply the moneys arising therefrom in the manner following, to wit: —

"1. To pay the expenses and charges attending this assignment and carrying fully into effect the provisions thereof.

"2. To pay James Gray the amount of the balance due to him for moneys advanced and rent in arrear, according to the award of Isaac Harris under the submission by the said Gray and Stevenson to the said Harris; said Gray also to be credited with the amount of the two last notes due by Stevenson to M. Nesbitt, which said Gray has assumed to pay.

"3. To pay Reihle and Baynes the amount of a draft drawn by Samuel Stevenson on William Stevenson, and accepted by the latter, for the sum of 1027 dollars.

"4. To pay all the creditors of the said Samuel Stevenson to whom James Gray may have become liable by acceptance, indorsement, assumption or otherwise, viz.

Date. 1832.	*Kind of Security.*	*Drawer.*	*Acceptor.*	*In whose favor.*	*Due.*	
May 6,	Draft,	S. Stevenson,	J. Gray,	Wm. Bell & Co.	Sept. 6–9,	$657 45
" "	"	"	"	do.	Nov. 6–9,	657 45
" 1,	"	"	"	H. During,	" 1–4,	264 97
" 23,	"	"	"	C. Curtis,	Oct. 23–26,	549 43
" "	"	"	"	Wm. Bell & Co.	Nov. 23–26,	449 43
" "	"	"	"	do.	Jan. 23–26,	449 43
" 25,	"	"	"	Martin & Harvey,	do. do.	624 37
" 23,	"	"	"	C. Curtis,	Oct. 23–26,	521 21
" "	"	"	"	Wm. Bell & Co.	Jan. 23–26,	605 87
" "	"	"	"	C. Curtis,	Feb. 23–26,	521 21
Also, the said Gray's responsibility to James J. Breban,						1189 68
Also,	"	"	"	to Jesse Myers, due,		1170 00
Also,	"	"	"	(two first notes) to M. Nesbitt ($500),		1000 00

"And if the said James Gray has paid any of the above claims, then to pay him the amount thus paid. Also, in the event of a recovery by Pogue & Co. (of a claim which they assert of responsibility of the said James Gray, for the debt due by the said Stevenson to them of about 580 dollars), from the said James Gray, then to pay the said amount and not otherwise.

"5. To pay George A. Cook 200 dollars, money borrowed of him by the said Samuel Stevenson.

"6. To pay all debts due by the said Stevenson for house expenses, clerk hire, &c.

"7. To pay Campbell, Jones & Opie, for the use of Campbell, the amount of debt due them (about 900 dollars), upon condition that said Campbell, Jones & Opie shall release said Stevenson from all debts, &c. due them, and that this payment inure to the benefit of Campbell.

"8. To pay Bell & Horner any amount actually paid by them or agreed to be paid in purchasing or satisfying any debts of the said Stevenson, at his request, upon their executing a full release of the said Stevenson from all debts, &c.

"9. To pay the debts contracted by the said Samuel in Philadelphia, for the purchase of merchandise (for which debts promissory notes were given), in May last, to each creditor who shall execute a full release of the said Stevenson, his equal proportion.

"10. To pay all other creditors of the said Samuel Stevenson, in equal proportions, who will execute, to the said Samuel, a release, acquitting and discharging him from all debts and claims whatsoever on their behalf; such release to be signed on or before the 1st day of November.

"And then: That said William Bell, Jun., John Alexander and Thomas Stevenson, if any surplus shall remain after paying the said several debts, shall pay over the same to the said Samuel Stevenson.

"And I, the said Samuel Stevenson, do hereby make, constitute and appoint the said William Bell, Jun., John Alexander and Thomas Stevenson, and the survivors of them, to be my attorneys irrevocable, to collect the debts and demands due to me, and make sale of the goods and chattels and property, and, in general, all such acts, matters and things for me and in my name to do, as I might or could do were I personally present.

"In testimony whereof, the said parties have hereunto set their hands and seals, the day and year first herein written."

At the time this deed was executed, Samuel Stevenson was indebted in the sum of 30,000 dollars, to wit, 21,000 dollars by bills and notes, and 9000 dollars otherwise. The defendants proved that the directions of the Acts of Assembly in relation to voluntary assignments had been strictly pursued.

The court charged in favor of the validity of the voluntary deed of assignment, and the jury found accordingly for the defendants.

Fetterman, for the appellant.

The court declined hearing *Watts* and *Biddle* for the appellees.

PER CURIAM. Though it would have been better had these conditional assignments been brought within the purview of the 13 Eliz., as they might have been originally, and, in fact, have been in some of our sister States; it is too late to do so now. They have occurred in countless numbers, and have been sustained when brought before the courts; so that the title to an immense amount of property, perhaps to the value of millions, depends on them; and we should introduce a scene of the wildest confusion, perhaps of mercantile ruin, were we to disturb it. We are required by the argument, in effect, to overturn a train of decisions deeply seated in authority, and introductive of a peculiar rule of property; and whatever considerations of reason or policy might have been presented to this court originally, as inducements to lay the foundations of this part of our jurisprudence differently, it is sufficient that the time for it has gone by, and that we are to administer the justice of the country according to the laws as we find them. We therefore think that a new trial was properly refused.

Judgment affirmed.[1]

[1] And see *Halsey* v. *Whitney*, 4 Mason, 206 (1826).

THOMAS *v.* JENKS.

SUPREME COURT OF PENNSYLVANIA. 1835.

[*Reported* 5 *Rawle*, 221.]

THIS was an appeal by Joseph S. Sloan, assignee of Jenks and Company, from the decision of the Court of Common Pleas of Bucks County, awarding to the plaintiffs the money in the hands of the sheriff, made under executions against Jenks and Company.

By indenture dated the seventh day of February, A. D. 1833, William P. Jenks and William Maris, trading as William P. Jenks & Co., made an assignment to Sloan of all the machinery, stock, goods, chattels, debts, moneys, effects, messuages, lands and tenements, book debts, accounts, claims, and all other things whatsoever of the said William P. Jenks & Co., as well real as personal, in trust to pay creditors in the manner therein set forth.

The assignment contained the following proviso: provided always, nevertheless, that no creditor shall be entitled to any benefit under the assignment, who shall not on or before the sixth day of March next, at 12 o'clock at noon on that day, in due form of law execute a full and sufficient release of and from their respective claims to the said William P. Jenks and William Maris, *individually and as co-partners*. Fourthly, to restore and repay to the said William P. Jenks and William Maris, the residue of the estate and effects or the proceeds thereof remaining in the hands of the said Joseph S. Sloan, after payment and discharge and indemnity of the aforesaid claims in the manner and order aforesaid.

Releases were accordingly signed by a number of the creditors on the fifth day of March, 1833.

On the 8th of April, 1833, Thomas and Parry issued writs of *fi. fa.*

On the eleventh day of April, 1833, the sheriff levied under the plaintiff's executions on the property, the right to the proceeds of which was the subject of the present controversy.

Sloan issued a foreign attachment against William P. Jenks & Co., and directed the sheriff to attach the machinery included in the assignment.

Sharswood (*J. R. Ingersoll* was with him) for the appellant.

Ross, contra.

Randall, on the same side, was relieved by the court.

GIBSON, C. J. It is difficult, at a glance, to reconcile the mind to the decisions in support of these conditional assignments in any case; or comprehend how a conveyance which puts the debtor's property beyond his creditor's reach, except on terms prescribed by himself, can be anything else than an act to "delay, hinder, and defraud" within the purview of the 13 Elizabeth. On the other hand, where the object is in

truth distribution and not hindrance, the supervening delay being but incidental to the process, it is not easy to point out a defect in the argument on which they have been sustained. The basis of it is the admitted right which every debtor in failing circumstances has, to prefer one creditor to another: for as an assignment on valuable consideration and for a lawful purpose as payment of debts is, necessarily passes the property out of the debtor, the consequence indicated as apparently objectionable, is unavoidable though there be even an express reservation of a trust for the debtor in the unconsumed surplus, which is no more than the law would imply without it, such surplus being liable in his hands as if it had never passed from him. The difficulty is to understand how he may lawfully manage his right to give a preference in such a way as to secure an advantage to himself in the release of his person and future earnings. And the solution of it is found in the arbitrary control over the order of payment allowed him by the common law, and not restrained by the 13 Elizabeth; which, suffering him to postpone any creditor to the rest, makes participation of the fund before those he may choose to prefer are served, not so much matter of right as of favor. To let a creditor in among the first, therefore, though on condition that he release the unpaid residue of his debt, may be to do him a favor instead of a wrong, which may consequently be extended to him on terms, or not at all. Having an unquestionable power of preference of which he is the absolute master, it follows that he may set his price on it provided it be not a reservation of part of the effects for himself, or anything that would carry his power beyond mere preference. Such is the unavoidable, if not the just, effect of suffering a debtor to distribute the wreck of his fortune among his creditors according to his pleasure; and it is the repugnance of the mind to inequality of satisfaction which has induced legislators to extirpate the root of it in bankruptcy and insolvency, by substituting for it a process of distribution paramount to the will of the debtor. To expunge the principle of preference from a bankrupt law made by the debtor for himself, so long as he is permitted to legislate for himself, would require the force of a Statute: and I am unable to say that the decisions which sustained these assignments originally, though coupled with a stipulation for prospective exemption, were unfounded in the principles of the common law: certainly it is now too late to question their authority. The legality of such a stipulation seems not to have been contested in *Burd* v. *Smith*, 4 Dallas, 76. Indeed the reasons of the judges are so indistinctly set forth in that case, and the discrepance of their views is so remarkable, as to render it of little value as a precedent for anything. From *Lippincott* v. *Barker*, 2 Binney, 174, in which the point was expressly ruled, to the present time, the occurrence in practice of a countless number of such assignments — many of them recognized by judicial decision — and the immense amount of property held by the title, would make it dangerous even to pause as to the validity of it.

But the principle of preference on terms of compromise, is not to be indulged so far as to legalize the reservation of a portion of the effects for the debtor. In *M'Allister* v. *Marshall*, 6 Binney, 338, it was held that an assignment of *all* the effects upon a stipulation to re-convey *a part* for the benefit of the debtor's family, is void for the part to be re-conveyed. It was not necessary to pronounce it void for the whole, as no more than the part re-conveyed was in contest; but nothing is clearer than that a contract fraudulent in part by the provisions of a Statute, whatever be the abstract effect of fraud in other cases, is void in the whole. The principle has since been applied in *Hyslop* v. *Clark*, 14 Johns. 465, to the very case of an assignment in trust for payment of debts. Under the 13 Elizabeth, then, what is the difference between a conveyance of the whole on terms of returning a part, and a conveyance of a part in the first instance? Certainly but a difference of form, and not a difference in principle or effect. In either form the transaction would give the debtor the same advantage at the expense of the creditors. A debtor, for example, who has enough to pay seventy-five per cent. all round, assigns two-thirds of his effects, or to the value of fifty per cent. of his debts, in trust to pay those who shall release by a day certain; and retains to the value of twenty-five per cent. With the alternative of choosing between these two funds put before him, what would a creditor probably do? If two-thirds in value, and no more, should happen to prefer the trust fund, they would get seventy-five per cent.; their just proportion of the whole effects; while the others would get as much from the portion in the hands of the debtor; and in that conjuncture any particular choice would be indifferent to him. But if less than two-thirds should accept the terms proffered in the assignment, they would get more than their just proportion, and those who rejected them would get less. If, however, all should accept, then all would get at the least fifty per cent., while if all should reject, they would get but half as much. The probability therefore is that a great majority — perhaps all — would elect the trust fund; and that would leave a surplus to the debtor. Now it must be obvious that an exercise of the right of preference, which might produce that result, cannot be a legitimate one. The creditors are entitled to the benefit of the whole estate, of which they are not to be deprived by an arrangement which would impose on them the necessity of resorting to a part of it in exclusion of the rest. The very imposition of a choice which might prove unfortunate, would be an exposure of them to a peril which they are not bound to encounter. An assignment, therefore, that would present but a part of the effects to the creditors and refuse the rest, is necessarily fraudulent, inasmuch as it might be a means to extort an unfair advantage. But why, it may be demanded, shall not the debtor be suffered to stipulate for a part of the property as well as for the exemption of his person and future acquirements? The answer is that the Statute, by which alone any stipulated exemption is prohibited, looks but to property which may be the subject of

present assignment. It protects the creditor's recourse to the property conveyed by avoiding all conveyances that would "delay, hinder, and defraud" him of it, without, however, protecting his recourse to anything else, because the assignment cannot operate on anything else.

Now an assignment of partnership effects is a partial one wherever the debtor has separate property. The terms of the present, embrace "all manner of machinery, stock, goods, chattels, debts, accounts, claims, and all other things whatsoever of the said William P. Jenks and Company, as well real as personal, and of what nature, kind or quality soever," which evidently has respect but to the joint effects. And this assignment of the partnership effects is on condition that the creditor execute by a day certain, "a full and sufficient release of and from his claim, to the said William P. Jenks and William Maris, *individually*, and as co-partners." Such a release would unquestionably exonerate their separate estates; and the validity of the assignment therefore depends on a single question of fact. It amply appears in the proofs reported by the commissioner, that both partners had separate property — the one to the value of several hundred dollars, and the other to the value of several thousand. The assignment was therefore fraudulent and void; and the proceeds of the property were properly awarded to the execution creditors.

Decree in each case affirmed.

BARNEY *v.* GRIFFIN.

COURT OF APPEALS OF NEW YORK. 1849.

[*Reported* 2 *Comst.* 365.]

BRONSON, J.[1] This was an assignment by an insolvent debtor of all his property, in trust to pay certain specified creditors, and then, without making any provision for other creditors, in trust to re-convey the residue of the property to the debtor. We need go no further to see that this was a fraud upon the plaintiff, and the other creditors who were not provided for by the deed. The property was placed beyond the reach of their judgments and executions, in the hands of men who were not accountable to them, and upon a trust which was in part for the benefit of the debtor. The courts have very reluctantly upheld general assignments by an insolvent debtor, which give a preference among creditors (*Boardman* v. *Halliday*, 10 Paige, 229, 230), and they can only be supported when they make a full and unconditional surrender of the property to the payment of debts. The debtor can neither make terms nor reserve anything to himself, until after all the creditors have been satisfied. This question was considered upon

[1] The opinion only is here given.

authority in *Goodrich* v. *Downs*, 6 Hill, 238, and we think the case was properly decided.

The deed was void upon its face; and it cannot be made good by showing that there will be no surplus for the debtor after paying the preferred creditors. The parties contemplated a surplus, and provided for it; and they are not now at liberty to say that this was a mere form which meant nothing. And although it should ultimately turn out that there is no surplus, still the illegal purpose which destroys the deed is plainly written on the face of the instrument, and there is no way of getting rid of it. The cases already cited of *Goodrich* v. *Downs* and *Boardman* v. *Halliday* are in point upon this question.

It is also an unanswerable objection to the deed, that the assignees are authorized to sell the property on credit. An insolvent debtor cannot, under color of providing for creditors, place his property beyond their reach, in the hands of trustees of his own selection, and take away the right of the creditors to have the property converted into money for their benefit without delay. They have the right to determine for themselves whether the property shall be sold on credit; and a conveyance which takes away that right and places it in the hands of the debtor, or in trustees of his own selection, comes within the very words of the Statute; it is a conveyance to hinder and delay creditors and cannot stand. This question was considered by the Chancellor in *Meacham* v. *Sternes*, 9 Paige, 405, 406, and his views fully accord with my own.[1]

There is a third objection to the deed. The property is not only charged with the payment of "all costs, charges, disbursements and expenses" in executing the trust, but the trustees are also to have "a commission of six per cent. on the gross amount of the moneys received and paid by them." If the debtor can provide for anything more than the necessary expenses of executing the trust, I think he cannot go beyond the commissions allowed by law to executors, administrators and guardians for similar services (see *Meacham* v. *Sternes*, 9 Paige, 398), which, considering the magnitude of the estate, is much less than the trustees are to receive. (2 R. S. 93, § 58; p. 153, § 22.) It may be very true, as the answer alleges, that the commissions allowed by the deed are "no more than a just, fair and proper compensation" to three men "all actively engaged in professional pursuits." But unless something was to be done besides winding up the estate, without delay, for the benefit of creditors, it was not necessary to have three trustees: and a competent agent might have been found who would not have required a very large commission on account of the value of his time for professional pursuits. If an insolvent debtor should be allowed to give a large reward to the friends whom he selects and puts in the place of the process and officers of justice, it would not only divert a portion of the property from those who ought to have it, but it might

[1] So *held* in *Nicholson* v. *Leavitt*, 6 N. Y. 510 (1852). But such a provision is in many States *held* good. See Burrill, Ass. (5th ed.) §§ 220, 221. — Ed.

induce the assignees to consult the interest of the debtor at the expense of the creditors.

This objection, standing alone, may not go beyond the excess of commissions. But we think the deed wholly void on the other grounds which have been mentioned.

Decree affirmed.

D. Lord, Jun., for appellants.
Geo. F. Comstock, for respondent.

COLLOMB *v.* CALDWELL.

COURT OF APPEALS OF NEW YORK. 1857.

[*Reported* 16 *N. Y.* 484.]

APPEAL from the Supreme Court. The plaintiffs having had an execution returned unsatisfied, upon a judgment recovered by them against one George Caldwell, brought their action in the nature of a creditor's bill, for the purpose, among other things, of setting aside an assignment, executed by George Caldwell and his partner in mercantile business, of all their stock in trade and other personal property, and of certain real estate which was alleged to have belonged to them, not as partners but as tenants in common. The assignment, after providing for the payment of all debts which the assignors owed as partners, required that if there should be any surplus "after the payment of all debts *aforesaid*, the same shall be returned to the parties of the first part." The cause was tried before Mr. Justice *Cady*, without a jury. He found, as matters of fact, that the partnership was insolvent at the time of the assignment, and that all the property assigned was insufficient for the payment of the partnership creditors, and that the real estate assigned was not partnership property. He held the assignment valid, as against the plaintiff, and judgment was rendered accordingly, which, upon appeal, was affirmed by the Supreme Court, at General Term in the Fourth District. The plaintiffs appealed to this court.

William D. White, for the appellants.
John H. Reynolds, for the respondents.

COMSTOCK, J. George Caldwell and J. W. Caldwell, being insolvent, both as a partnership and individually, assigned their partnership personal estate, together with certain real estate, which they owned as tenants in common, to the defendants Read and Mitchell, in trust to pay the debts of the firm in a certain order, and with a reservation to themselves of the surplus if there should be any. The plaintiffs, who were creditors of George Caldwell, having obtained subsequent judgments, insist that the assignment was fraudulent and void as to them, on account of that reservation.

In the case of *Goodrich* v. *Downs*, 6 Hill, 438, the assignment pro-

vided that if any surplus remained after paying the debts specified, it should be returned to the assignor; there were creditors not provided for in the assignment. The assignment was held void, although it appeared, as it does in the present case, that the property embraced in the trust was not sufficient to pay the enumerated creditors. This decision, so far as it may be understood to have turned upon the Statute (2 R. S. 135, § 1) relating to conveyances, &c., of goods, &c., "in trust for the use of the person making the same," has been overruled by this court. (*Curtis* v. *Leavitt*, 15 N. Y. 9.) But in overruling the decision in that respect, we by no means called in question the doctrine that an assignment by an insolvent is void for actual fraud, if, while he provides for only a part of his creditors, he makes the attempt, in the instrument, to reserve any portion of the fund to himself. Such an attempt has been regarded as establishing what is sometimes termed "fraud in law," but more accurately speaking it affords a conclusive presumption of an actual fraudulent design on the part of the assignor. In this view of the question, *Goodrich* v. *Downs* was well enough decided, and the decision, considered as depending upon this principle, was approved in *Barney* v. *Griffin*, 2 Comst. 365. In that case, a large real estate was conveyed by a failing or insolvent debtor, in trust to pay a portion of his creditors, and then to re-convey to the debtor so much of the estate as should remain undisposed of. The bill set forth the conveyance, and charged fraud, which the answer explicitly denied, and there was no evidence taken in the case. It appeared also from the answer, upon which no issue was taken, that there would be, in fact, no residue of the estate after paying the specified debts. The assignment was nevertheless held fraudulent and void upon its very face. It was observed that "the parties contemplated a surplus and provided for it, and they are not now at liberty to say that this was a mere form which meant nothing." Besides this ground of decision, some others were mentioned in the opinion of Judge Bronson, but it is well known that this is the point on which the judgment of this court was pronounced against the assignment.

It seems impossible to distinguish between the cases referred to, especially that of *Barney* v. *Griffin*, and the one now before us. The Caldwells, being insolvent, assigned the estate, which they owned together, to pay the debts which they jointly owed, but one of them also owed debts individually, which were entitled to be paid out of the residue of his share in the fund assigned. Instead of making provision for paying these individual debts, the whole fund was tied up under a trust, and after the particular trusts should be satisfied the residue was reserved to the assignors. It is true, this reservation might not vitiate the assignment, if the fund to which it attached had consisted of partnership property only. The rights of a creditor of one partner are subject to an equitable adjustment of accounts between the partners themselves, and therefore it may not be fraudulent to provide, in an insolvent partnership assignment, that the surplus of the effects shall

be returned to the firm instead of being directed to the payment of the private debts of either of the members. But the real estate assigned by the Caldwells, as we understand the case, was held by them as tenants in common. The interest of each was therefore his individual property, as much so as his separate estate. Thus they had no right to convey in trust with a reservation in their own favor, leaving their individual creditors unprovided for.

So much of the judgment of the Supreme Court as sustains or depends upon the validity of their assignment must be reversed, and a new trial granted.

All the judges, except SHANKLAND, J., concurring,

Judgment reversed and new trial ordered.

McFARLAND *v.* BIRDSALL.

SUPREME COURT OF INDIANA. 1860.

[*Reported* 14 *Ind.* 126.]

APPEAL from the Fayette Circuit Court.

DAVISON, J. The appellants, who were the plaintiffs, brought an action against Birdsall and Thatcher upon a promissory note for the payment of 1,243 dollars. The note bears date March 29, 1856, and was payable to the plaintiffs at six months.

At the commencement of the suit, one Naham H. Burk, as agent of the plaintiffs, and on their behalf, filed an affidavit alleging that upon said note there is indorsed two credits, viz., April 6, 1857, 500 dollars; June 1, 1857, 500 dollars; leaving a balance due thereon of 301 dollars, 86 cents; and that the defendants, Birdsall and Thatcher, have sold and conveyed their property subject to execution, with the fraudulent intent to cheat, hinder, and delay their creditors.

Upon this affidavit, the plaintiffs having executed a written undertaking, as required by the Statute, an order of attachment was duly issued against the defendants. And further, the proper affidavit having been made, a summons was duly issued against Benjamin F. Miller and others (naming them), as garnishees.

Defendants answered the complaint, 1. By a general denial; 2. Payment; and in defence of the attachment, they deny that defendants have sold or conveyed their property subject to execution, with the fraudulent intent to cheat, hinder, or delay their creditors, and aver that whatever disposition has been made of their property, was for the benefit, and to promote the interest, of said creditors. This defence is verified by oath.

To the second paragraph, the plaintiffs replied in denial; and to the

answer in defence of the attachment, they filed a demurrer, which was overruled; but the court, upon the plaintiffs' motion, struck out that branch of the answer which begins with the words, "and aver," and ends with "said creditors."

The garnishees answered, in effect, that the several demands against them, and in favor of the defendants, had been, before the commencement of this suit, assigned by the defendants to one Benjamin P. Miller, and that by virtue of that assignment, they, the garnishees, are indebted to said Miller, and not to the defendants.

The issues were submitted to the court, who found for the plaintiffs 303 dollars, the balance of the note sued on; and further, the court found for the defendants and garnishees in the attachment, and, having refused a new trial, rendered judgment upon the finding, &c.

The first question to settle relates to the action of the court in overruling the demurrer to the answer. There was no error in this ruling. The pleading to which the demurrer applied was, in effect, nothing more than a general traverse of the fraud charged in the affidavit, which led to an issue of fact, the affirmative of which the plaintiffs were bound to prove.

Upon the trial, the plaintiffs, in support of the averment that defendants had sold and conveyed their property with a fraudulent intent, &c., gave in evidence a deed of trust executed by defendants to said Miller. By this deed, they sold, assigned, and conveyed to Miller the entire stock of goods held and owned by them as partners, &c.; also all the notes, books, and book accounts appertaining to their store; and also certain real estate in Fayette County (describing it), the separate property of Birdsall, one of the partners; to have and to hold to said Miller, in trust, to be disposed of as he may deem most expedient, to pay and satisfy, as far as it may, the following notes due and owing by them: Here the deed sets forth and severally describes various notes, amounting, in the aggregate, to 4,764 dollars, and then proceeds: These notes, having been given for borrowed money, are hereby made preference claims, and the assignee is required to pay them, *pro rata*, and if the property so assigned be sufficient to pay them, and leaves a surplus, then such surplus is to be applied in payment of the following notes, which the deed also sets forth and severally describes, and which amount, in the whole, to 4,306 dollars. Appended to the deed, there is a schedule of the notes and accounts assigned to the trustee, amounting to 8,136 dollars. The deed stipulates "that any surplus remaining after the payment of the last-mentioned class of notes, is to be returned to the assignors;" and also contains this provision: "It is understood that, in case any creditor or creditors above named decline taking under this assignment, and wait the closing of the same for any balance that may be coming after the fund is exhausted, such creditor or creditors shall be excluded entirely from the benefits thereof, and all to be then applied to the other creditors abiding the assignment," &c.

The appellants contend that the stipulations just recited render the trust deed fraudulent in law, and this position, it is said, involves the main inquiry in the case.

Burrill, in his treatise on Assignments, says: "A reservation of the surplus to the assignor, where it is made to depend upon certain conditions to be complied with by the creditors, and particularly upon the condition of releasing the debtor, will avoid the deed." Bur. on Assign., 181. This rule, so far as it relates to the release of the debtor, has been recognized by this court. *Henderson* v. *Bliss*, 8 Ind. R. 101.

In this case, however, there is no condition requiring a release. The creditor, it is true, is excluded from the benefit of the fund unless he abides the assignment, and waits the closing of it, for any balance that may be due him after the fund is exhausted; and the fund, in case he fails to recognize the assignment, is to be all applied to the other creditors. This condition, it seems to us, ought not to be allowed to render the deed fraudulent *per se*. It does not coerce the creditor into a relinquishment of his demand, nor does it reserve to the debtor the share to which the creditor would have been entitled had he become a party to the assignment.

Thus, it has been decided that a clause in an assignment authorizing the payment to the assignor of the surplus that might remain after the satisfaction of the debts of such creditors as should become parties to it, does not invalidate the assignment, as creditors not parties can pursue their remedies against the debtor, following the surplus either in his hands or those of the trustee. *Conkling* v. *Carson*, 11 Ill. R. 503; *Livingston* v. *Bell*, 3 Watts, 198; *The Mechanics' Bank* v. *Gorman*, 8 W. & S. 304; *Shipwith* v. *Cunningham*, 8 Leigh, 271; *Phippen* v. *Durham*, 8 Grattan, 457; *Halsey* v. *Whitney*, 8 Mason, 206; *Brown* v. *Lyon*, 17 Ala. R. 659; *Dana* v. *The Bank*, 5 W. & S. 223; *Bergin* v. *Bergin*, 1 Ired. 453; *Beck* v. *Burdick*, 1 Paige, 305.

Upon the questions under discussion, the authorities are not uniform; but the weight of them evidently sustains the position that, in the absence of the requirement of a release from the creditor, the mere hypothetical reservation of the surplus to the debtor, will not vitiate the assignment. Indeed, there are decisions to the effect that such a reservation is in no case fraudulent *per se*, but only a circumstance from which a jury may infer the intention of the parties. *Estwick* v. *Cailand*, 5 T. R. 420; *Bergin* v. *Bergin*, *supra*.

The evidence shows that some three or four of the defendants' creditors, whose claims in the whole amount to 150 dollars, are not named in the deed; and this, it is said, renders the assignment void; but these creditors are not complaining, and, moreover, it was sufficiently proved that their claims were omitted through mistake.

We are of opinion that the trust deed was not fraudulent in law; and whether it was so in fact, was a question for the court sitting as a jury.

Benjamin P. Miller, the assignee, being on the stand as a witness, the defendants, on his cross-examination, propounded to him this question: "State whether, so far as you have any knowledge, information, or belief, the foregoing assignment was *bona fide* or fraudulent; and if fraudulent, what facts are within your knowledge to show it?"

Plaintiffs objected to the interrogatory thus propounded, on the ground that an answer to it would tend to contradict the deed; but their objection was overruled, and they excepted.

This exception is not well taken. As we have seen, the deed was legal upon its face, and evidence tending to show that, in point of fact, it was an honest transaction, instead of contradicting it, would be consistent with its legal effect. Similar objections were made to like questions propounded to other witnesses, which were correctly overruled.

All the evidence given in the cause is in the record. We have examined it carefully, and, in our opinion, it furnishes no sufficient proof of the fraudulent intent charged in the affidavit.

Per Curiam. The judgment is affirmed with costs.

B. F. Claypool, for the appellants.

S. W. Parker and *J. C. McIntosh*, for the appellees.

TIBBALS *v.* JACOBS.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1863.

[*Reported* 31 *Conn.* 428.]

EJECTMENT; tried to the jury in the Superior Court on the general issue, before *Park*, J.

The demanded premises, previous to the 4th day of May, 1857, belonged to Joel Jacobs, one of the defendants, who on that day conveyed them by quit-claim deed to the other defendants, who were his children. The plaintiffs had since levied an execution on the premises and had them set off to them in satisfaction of it. On the trial the plaintiffs offered evidence to prove that Joel Jacobs conveyed the premises to his children for the purpose of avoiding the support of his wife, who was then living with him (they being the children of a former wife), that the children (except two who were absent) participated with him in the design, and that on the 22d of May, 1857, he removed all his furniture from his house and deserted his wife, making no provision for her support, and that she was from that time till her death supported by the plaintiffs, who were her children by a former husband; their expenditures in her support constituting the claim on which the judgment was recovered which was afterwards levied on the demanded

premises. The plaintiffs offered further evidence to prove, and the fact was not denied, that the deed was executed without the knowledge or assent of John Jacobs and Eleanor L. Hills, two of the grantees under it, and who were also defendants; that the said John Jacobs was then at sea and knew nothing of the matter until his return some time after the execution and delivery of the deed, when he was informed of it and accepted the deed and paid his proportion of the consideration; and that the said Eleanor subsequently ratified the contract in like manner, and paid her proportion of the consideration of the deed. Upon the evidence in relation to these two grantees, the plaintiffs claimed that if the jury should find the facts as claimed by them, although the contract was entered into in good faith, still the deed, as against the plaintiffs as creditors, was void as to all the grantees, and that no subsequent ratification could validate it as against the plaintiffs; but the court did not so instruct the jury. The plaintiffs further claimed upon this point, and requested the court to charge the jury, that if they found the facts on this point as claimed by the plaintiffs, the deed was void as against the plaintiffs as to so much of the property as was conveyed by it to the said John and Eleanor; but the court did not so charge the jury.

The plaintiffs further introduced evidence to prove, and claimed to have proved, that at the time of the execution of the deed there was a secret agreement between Joel Jacobs the grantor, and all the grantees, excepting John Jacobs and Eleanor Hills, that the grantees should pay the sum of $280, to enable the grantor to pay all the debts he then owed, which sum was paid and the debts satisfied, and that the grantor should continue in possession of the premises and have the use thereof during his life, for the support of himself and wife, and if the income should not prove sufficient for their support that the grantees should make up the deficiency; and that in a portion of the premises the grantor had only a life estate; and requested the court to charge the jury that if they found the facts as claimed by the plaintiffs upon this point, the conveyance was void as a matter of law, as against the plaintiffs, although entered into in good faith. The court did not so charge the jury, but left the question to them as a question of fact, whether from all the evidence in the case there was fraud or not. The plaintiffs further requested the court to charge that if they should find these facts as claimed by them, they might legally infer fraud, although they might find that the contract was in fact entered into in good faith. But the court did not so charge, but left the question to the jury as one of fact.

The plaintiffs offered evidence to prove that Joel Jacobs, the grantor, at the time of the commencement of the present action, was the party in actual possession of the premises, and that the conveyance was only colorable and fraudulent, and offered one of themselves to prove a declaration made by the said Joel not long previous to the execution of the deed, that he would dispose of all his property in such a manner

that he could not be compelled to support his wife; which declaration was not made in the presence of any other of the defendants, nor was it claimed that it ever came to the knowledge of any one of them, nor did it appear nor was it claimed that any negotiations at the time had commenced for the sale of the land to the grantees. To the admission of this evidence the defendants objected, and the court rejected it.

The defendants offered evidence to prove that the consideration of the deed was the sum of $280 in money, and the future support of the grantor and his wife during their lives; that the grantees went into possession of the premises and rented the same and applied the avails thereof under the contract towards the support of the grantor and in part payment for the premises, and that the grantor in no other way derived any benefit from the property; and that the consideration paid by the grantees was full and adequate, and that the grantor was not indebted at the time to any creditors except those whom he paid from the $280.

The jury returned a verdict for the defendants, and the plaintiffs moved for a new trial for error in the rulings and charge of the court.

Culver, with whom was *Warner*, in support of the motion.

Tyler and *Phelps*, contra.

Hinman, C. J. We have no difficulty with most of the objections taken by the plaintiffs' counsel to the rulings of the Superior Court. It is claimed, in the first place, that the court erred in not charging the jury that the deed of Joel Jacobs to Charles Jacobs and others, so far as it purported to convey an interest in the premises to John Jacobs and to Eleanor Hills at a time when they had no knowledge of the conveyance, was void, notwithstanding they both accepted it, and the terms upon which it was given, as soon as it was first brought to their knowledge. But this point is well settled the other way. It was last before this court in the case of *Merrills* v. *Swift*, 18 Conn. 257, and it is there held, as the result of an examination of the authorities, that neither the presence of the grantee, nor his previous authority to a third person to receive a deed on his behalf, nor even his subsequent express assent to it, is necessary to make the delivery of a deed valid; but where the deed is beneficial to him his assent will be presumed, unless indeed it appears that he dissented. There was therefore no error in the ruling on this point.

In the second place, it is insisted that the court should have charged the jury that a secret understanding and agreement between the grantor and the grantees, that the grantor should retain the possession of the premises, and have the use and income thereof during his life, he having only a life estate in a portion of the property, rendered the deed void as matter of law. This claim cannot be sustained. The rule of law in respect to the retention of personal property in the possession of the vendor after a sale, has never been applied to real estate. And where deeds are recorded, as with us, no good reason can be given for so stringent a rule. The true state of the title can always be known

by reference to the town records by all who will take the trouble to examine them. If a grantee neglects to cause his deed to be recorded he subjects his land to a liability to attachment for the debts of his grantor, a consideration which is sufficient to secure the recording of the deed. Such an agreement, with other circumstances, may be evidence of fraud, but to apply the harsh rule in respect to retention of possession by a vendor of personal property after a sale to real estate, would produce very great inconvenience with little corresponding benefit. This circumstance, with the other evidence in the case, was properly left to the consideration of the jury, and there was no error in the omission to charge them on this point as requested.

Again, it was claimed that the court should charge the jury that they might infer fraud from the contract between the grantor and the grantees, claimed to have been proved, that the grantor should be paid two hundred and eighty dollars to enable him to pay all his debts, and that he should remain in possession of the property and have the use of it for his support and the support of his wife, and if the income should prove insufficient for this purpose, the grantees should make up the deficiency; although they might also find that the contract was in fact entered into in good faith. But if such a contract was lawful, as we think it was, and was also made in good faith, it is a contradiction in terms to say that fraud may be inferred from it. There was no error therefore in the omission of the court to recognize this claim.

There was, however, a question of evidence in the case which we think was incorrectly determined. The grantor, Joel Jacobs, and his grantees, were the defendants in the action. The grantor was also in possession under the grantees by virtue probably of the agreement made at the time the deed was executed. Now, as a defendant in possession, it was for his interest to retain his possession, and therefore his interest was to defeat the plaintiffs in this suit. Besides, if judgment went against him he was liable for costs. When the plaintiffs therefore offered to prove his declarations made previous to the execution of the deed under which he claimed, because he claimed under his own grantees, that he would dispose of all his property in such a manner as that he could not be compelled to support his wife, we do not see why they were not admissible against him at least, and whether against his grantees would depend upon whether there was evidence that they combined with him for such a purpose or not. Against him they were strong evidence of just such a contemplated fraud as the plaintiffs claimed. And they could have been admitted as against him and excluded as against the others if there was no evidence to connect them with him in the unlawful intention. And as we think they should have been so admitted, we on this ground advise the Superior Court to grant a new trial.

In this opinion the other judges concurred.

WINCHESTER *v.* CHARTER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1866.

[*Reported* 12 *Allen*, 606.]

WRIT OF ENTRY, brought by the assignee in insolvency of Daniel Charter, against him and his wife, to recover three parcels of land in Springfield.

At the trial in the Superior Court, before *Vose*, J., it appeared that on the 2d of August 1860 Daniel Charter, being the owner of the premises, and at the request of his sons, who were his creditors, executed and delivered a deed of warranty thereof to Henry Kennedy of Hartford, without pecuniary consideration, but with the agreement that Kennedy should convey the same to Mrs. Charter, to her sole and separate use. This deed was returned to Charter to be placed on record, but, Charter being informed that the deed was not valid by reason of his wife's not having signed it, he omitted to have it recorded until January 11th, 1861; and on the 25th of that month Kennedy executed and delivered a deed of the same premises to Mrs. Charter, which was duly recorded three days afterwards.

There was evidence tending to show that Charter, at the date of the deed, owned personal property worth between two and three thousand dollars, and that his whole indebtedness (except certain sums due to his sons, which have never been paid, or proved in insolvency against his estate) did not exceed fifteen hundred dollars; that before the 1st of September 1860 he procured a loan of fifteen hundred dollars, on a mortgage of the demanded premises, with which he paid all his indebtedness, except the sums due to his sons; that in the same September he incurred another debt of $200, which he paid prior to the next January; that prior to August 1860, he had greatly reduced his business; that he contracted debts, and bought and sold wood and wood lots, in the prosecution of his business, to a greater or less extent from August 1st, 1860 until he went into insolvency in June 1863; and that the earliest debt which remained unpaid at the time of his insolvency, excepting his debts to his sons, was contracted in October 1861.

The judge gave instructions upon the effect of this conveyance upon the rights of existing creditors, which were not objected to. But as to future creditors, the defendant requested the judge to instruct the jury that "to avoid this deed there must have been not only an intention to secure the property against future creditors, but there must have been a design, then existing in the grantor's mind, to make creditors with a view to cheating them," and also, "that the intention to put this property beyond the control of future creditors would not invalidate the deed, unless there was also the fraudulent intention to obtain credit on

the supposition that he was the owner of this property." The judge declined to give these instructions, but did instruct the jury, that "in order to recover in behalf of future creditors, the jury must be satisfied that it was at least a part of the purpose which Charter intended and designed to accomplish by this settlement on his wife, to place this property where future creditors could not reach it to satisfy their debts, or, in other words, that he made it to delay and defraud those creditors whose debts he might contract subsequent to its date; that it was not sufficient that it was the effect of such settlement to hinder and prevent subsequent creditors from satisfying their debts out of the property so conveyed to the wife; there must be satisfactory proof that he designed and intended that it should have that effect; that it might aid the jury in determining whether such was his design and purpose, by inquiring whether, at the time of the conveyance to Mrs. Charter, he contemplated contracting future debts, whether he was engaged in any business at that time, in which, in its ordinary prosecution, he might anticipate the probability of contracting debts."

The jury returned a verdict for the demandant, and the tenants alleged exceptions.

N. A. Leonard, for the tenants.

J. Wells (*A. L. Soule* with him), for the demandant.

BIGELOW, C. J. The instructions given to the jury at the trial of this case seem to us to have been defective by reason of an omission to state with accuracy and precision the rule of law applicable to the rights of creditors, whose debts were contracted subsequent to a voluntary conveyance, to defeat and set it aside as being fraudulent and void as against them.

It is now the well-settled rule of law in this commonwealth that a conveyance of property made only on a meritorious consideration, as of blood and affection, is not *per se* fraudulent. Whether it be so or not is a question of fact, to be determined on a view of all the circumstances attendant upon the making of a grant or conveyance, especially on the condition of the vendor or grantor as to property and as to the amount of debts which were due and owing from him at the time he undertook to dispose of his estate, or a portion thereof, by gift, or without adequate consideration. *Thacher* v. *Phinney*, 7 Allen, 146, 150. *Lerow* v. *Wilmarth*, 9 Allen, 382, 386. On the one hand, it could not be properly adjudged that a voluntary conveyance was fraudulent and void, either as against existing or subsequent creditors, if it was proved to have been made by a person substantially free from debt, and possessed of a large amount of property, who had no purpose to hinder or delay the creditors, and whose sole motive was to transfer the property for the benefit of his wife or children, so that it should not remain at the hazard of business or be subjected to the risk of improvidence. On the other hand, it would be very clear that a voluntary transfer of property by a person deeply indebted, and whose property was inadequate or barely sufficient for the payment of his debts, would furnish

strong presumptive evidence of fraud; and, if unexplained, would be set aside as void against creditors.

Nor would this presumption of fraud be confined in its effect to pre-existing creditors. It would be equally strong as to those whose debts were subsequently contracted, because a transfer of property under such circumstances affords a reasonable ground of presumption that the intent with which it was made was to put beyond the reach of creditors, future as well as present, the fund or capital to which they had a right to resort for the payment of their debts. Whenever, therefore, no actual fraud or express intent to hinder and delay creditors is proved, it is necessary to show that a grantor at the time of making a voluntary conveyance was indebted beyond his probable means of payment remaining after the conveyance, in order to lay the foundation for the inference that it was made with a fraudulent design. It was in this sense that it was said in *Thacher* v. *Phinney*, *ubi supra*, that in order to avoid a voluntary conveyance as to subsequent creditors, it would be important to show that it was fraudulent as to existing creditors; otherwise, in the absence of other evidence of intent, it would be difficult to establish a valid ground for the presumption that the transfer was made with a view to hinder and delay subsequent creditors. But it by no means follows that a voluntary conveyance cannot be set aside by subsequent creditors unless it is shown to have been made in fraud of the rights of pre-existing creditors. If such were the rule of law, it would put beyond the reach of creditors, whose debts were contracted subsequent to a voluntary conveyance, property which was transferred fraudulently and collusively, with an express intent to deceive and defraud them. But it is perfectly well settled that if there be any design of fraud or collusion, or any intent to deceive third persons, in making a voluntary conveyance, although the grantor be not then indebted, the transfer will be voidable by subsequent creditors. In such cases the conveyance is made *mala fide*, and cannot be upheld in derogation of the claims of creditors. *Reade* v. *Livingston*, 3 Johns. Ch. 481. *Bennett* v. *Bedford Bank*, 11 Mass. 421. *Damon* v. *Bryant*, 2 Pick. 411. *Parkman* v. *Welch*, 19 Pick. 231, 237. Story on Sales (3d ed.), § 513, and cases cited in note.

It seems to us that the case at bar was of a nature to require that these familiar and well-settled principles should be fully stated and explained to the jury. The facts, as stated in the exceptions, disclose a case of a voluntary conveyance by a person who was perfectly solvent, and who subsequently paid in full all the debts which he owed at the time of the grant. The sole motive of this transfer appears to have been to secure the property for the benefit of the wife of the grantor. No fact is stated which tends to show that it was made with any intent to hinder and delay future creditors. If such was the real aspect of the case before the jury, the defendants were entitled to more explicit instructions than were given at the trial. It was not sufficient, to avoid the conveyance in question as to subsequent creditors, to show

that it was made voluntarily and with an intent to put the property in the hands of a third person, so that it would be for the use and benefit of the wife, and beyond the reach of creditors to whom the grantor might at some future day become indebted. These facts of themselves, unsupported by other evidence, would not warrant a jury in finding a fraudulent intent. It was necessary for the plaintiffs to go further, and to offer evidence from which it could be fairly inferred that the conveyance was made with an intent to put the property, so that it could not be come at to secure debts by attachment or seizure, which the grantor at the time of the conveyance intended to contract, and which he did not intend to pay or had reasonable grounds to believe that he might not be able to pay. We do not mean to say that the evidence should tend to show that the grantor intended to contract any particular debt or debts, but it should go far enough to satisfy the jury that there was an intent on the part of the grantor to contract debts, and a design to avoid payment of such debts by the conveyance of his property.

As the instructions are stated in the exceptions, we fear that they might have been understood by the jury as authorizing them to find the conveyance to be fraudulent, although the grantor, when he made it, had no intent to become indebted beyond his ability to pay; and had good reason to believe himself solvent, and did not design to hinder and delay creditors, merely because he made a conveyance of property for the benefit of his wife, in order to secure it against the risk of future insolvency which might possibly befall him in the course of his future dealings. The jury were in substance told that if the effect of the conveyance to the wife was to hinder and delay creditors to whom the grantor subsequently became indebted, and that the grantor in making it contemplated that it might have that effect, it would be fraudulent and void. The difficulty with the instruction is, that it leaves out of view the existence of a fraudulent intent. No voluntary conveyance can be made which may not in certain contingencies tend to put property beyond the reach of creditors of the grantor, and the happening of such contingencies may be reasonably supposed to be within the contemplation of every person who does not intend to withdraw himself from the active pursuits of life. But such a conveyance is not for that reason void as against subsequent creditors, unless it is also shown to have been made with a design to defraud them, as has been already fully stated.

Exceptions sustained.[1]

[1] Cf. *Carr* v. *Breese*, 81 N. Y. 584 (1880); *Jones* v. *Clifton*, 101 U. S. 225, 227 (1879); *Schreyer* v. *Scott*, 134 U. S. 405 (1890).

CASE *v.* PHELPS.

COURT OF APPEALS OF NEW YORK. 1868.

[*Reported* 39 *N. Y.* 164.]

APPEAL from an order of the Supreme Court in General Term, in the Sixth District, reversing a judgment entered upon the report of a referee, and ordering a new trial.

The action was brought, on the 4th of October, 1860, by the plaintiff, a creditor of the defendant Elbridge G. Phelps, by judgment recovered on the 14th of June, 1860, for moneys paid as his surety upon notes dated in March and April, 1855, and given by Phelps for money then borrowed. The object of the action is to set aside certain two conveyances claimed by the plaintiff to be fraudulent and void as to creditors of Phelps, — one executed by Elbridge G. Phelps, and Mary D., his wife, to Willard Phelps, dated December 18, 1854, recorded March 14, 1860, conveying a piece of land with a hotel thereon, in the village of Ithaca; the other executed by the said Willard Phelps, to the said Mary D. Phelps, of the same date, and recorded June 11, 1855, conveying the same premises.

The answer of the defendants denied all fraud; denied that, at the date of the conveyances, Phelps was indebted; averred that the premises were conveyed to the said Mary, through the said Willard, in good faith, subject to certain two mortgages thereon, without any intent to defraud creditors or other persons, for the *bona fide* purpose of giving up the premises and the management of the public house to the said Mary, that she might, in conducting the business, discharge the incumbrances, and support herself and family, the said Elbridge proposing to travel abroad and engage in the business of a public exhibition; that the said Elbridge has since that time been principally abroad, and the said Mary has managed the said public house in her own name, and therein, by her care and attention, has supported herself and children, and paid off one, and a portion of the other, mortgage; that the plaintiff had no claim against the said Elbridge, when the conveyances were made, and cannot question them; that the delay in recording the deeds was caused by mere inattention, and not by any fraudulent design or purpose, and the plaintiff was in no wise defrauded or misled thereby into signing the notes; that the said Mary is the sole owner of the premises, and they are not subject to any lien in favor of the plaintiff.

The referee reported in favor of the plaintiff, and found as facts:

The signing of the notes by the plaintiff as security for the defendant Elbridge, their payment by him, and judgment therefor, and execution returned unsatisfied; the ownership of the premises by such defendant, in 1849, and the occupation thereof as a hotel, by such de-

fendant and his wife, with no apparent change of ownership, down to the commencement of this action, except the recording of the deed from Willard Phelps, June 11, 1855.

That the deeds in question were executed in the city of New York, on the dates above mentioned, and were recorded as already stated; each of them expressing a consideration of $4,800.

That the conveyances were voluntary, and without any real consideration, but without any actual intent to defraud the creditors of said Elbridge G. Phelps, then existing.

That he then owed about $700, and that said conveyances were made with a view of said Phelps engaging in a travelling Indian show, and to secure said property for the benefit of himself and family, against any losses that might occur in said show; and that said Phelps, in said show business, did sustain heavy losses, and became entirely insolvent.

That the property was then worth $5,500, and was encumbered by two mortgages, amounting to from $3,200 to $3,500, which (excepting about $250) has been paid from the proceeds of the said hotel, such proceeds being produced by the joint labors of the said Elbridge, and Mary, his wife, in carrying on the business thereof. That, in 1861 (pending this suit), the said Mary leased the hotel to James Davison, for one year, at a rent of $700.

His conclusions of law are, that the plaintiff is to be deemed a creditor, as of the time of signing the notes as security.

That the deeds are fraudulent and void as against the plaintiff.

That the said Mary is entitled to no subrogation to a priority of the plaintiff, by reason of the payments made on the mortgages.

And he ordered judgment for the plaintiff, for the payment of his judgment, out of the property; for the appointment of a receiver to collect the rents, and apply them in satisfaction of the plaintiff's judgment, with leave, if the rents shall not satisfy the judgment and costs, to apply to the court for an order to sell the premises for that purpose.

Judgment being entered, in conformity with the direction of the referee, the defendants appealed; and the Supreme Court reversed the judgment, and ordered a new trial, in November, 1862, in the following terms: "Judgment reversed, and new trial granted; costs to abide the event."

The opinion of the Supreme Court, pronounced by Mr. Justice *Mason*, places the reversal on the sole ground, that the finding of the referee, that the conveyances to the defendant Mary D. were voluntary and without consideration, was against the evidence; but the order of reversal does not so state.

The plaintiff stipulated, and appealed to this court.

Ferris and *Dowe*, for the appellant.

Samuel Love, for the respondents.

WOODRUFF, J. In view of the clear and explicit language of sections 268 and 272 of the Code of Procedure, and the repeated decisions

of this court, in conformity with their requirement, many of which have been reported, it seems hardly necessary to say, that this appeal brings to us, for consideration, questions of law only, and we must therein assume, that the facts are correctly found, and upon sufficient evidence. It is not stated, in the judgment of reversal, that the judgment below was reversed on questions of fact. (*Crocker* v. *Crocker*, 31 N. Y. 507; *State of Michigan* v. *Phenix Bank*, 33 Id. 10; *Peterson* v. *Rawson*, 34 Id. 370; *Marco* v. *L. & L. Ins. Co.*, 35 Id. 664; and several cases in which the point is incidentally mentioned, not yet reported.)

We have no discretion; and, therefore, although the reason for reversing the judgment, assigned in the opinion of the Supreme Court, that the finding of the referee, that the deeds in question in this cause were voluntary and without consideration, is against the evidence, we are not at liberty to affirm the decision on that ground, however fully we might concur therein, if at liberty to examine the evidence upon that question.

If this want of jurisdiction enables the plaintiff to avoid the effect of a proper order for a new trial, an order to which the defendants were justly entitled, and the avoidance of which may work injustice to them, it is not due to any defect in the law, but to the unfortunate omission to insert in the judgment of reversal (as the Code in such case permits) the ground of the judgment appealed from.

Our Statute (2 R. S. 137) declares, that a conveyance shall not be declared fraudulent and void, solely on the ground that it was not founded upon a valuable consideration.

The same Statute declares, that the question of fraudulent intent shall, in all cases, be a question of fact.

The referee has, in this case, found, distinctly and affirmatively, that the conveyances in question, although without consideration, were made without any intent to defraud the creditors of the judgment debtor then existing.

Under such a finding of fact, it would be difficult for a court of review, having jurisdiction to consider questions of law only, to say that the conveyances in question were not, as to such existing creditors, perfectly fair and valid.

And, if the referee had made a like finding in regard to contemplated future indebtedness and creditors in whose favor it might arise, then, however it might be competent for the Supreme Court to reverse it as against evidence, we, in reviewing a judgment of reversal, which was not placed upon the question of fact, would still be compelled to say, that the finding is conclusive, and the conveyances valid, unless the other facts found showed a case of fraud in fact, which made the finding not only inconsistent, but erroneous in law.

The referee here has not, *in terms*, declared, that, as a question of *fact*, he finds any fraud whatever; it does not appear by his findings, that, at the time of the conveyances, Phelps was not a man of wealth,

and that, having respect only to his *then condition* and business, such provision for his wife and family (if provision for them was the sole object) would not be in all respects reasonable, fair and proper, leaving still in his hands an abundance, wherewith to pay all the debts which he owed, or contemplated as possible. Such a state of things, though not affirmatively found, might be presumed in support of what he did find, viz., that, although he owed seven hundred dollars, these conveyances were not made with intent to defraud his then existing creditors, and if not, then, as a question of law, the conveyances are valid as to them.

How then stand the conveyances as to subsequent creditors?

That a conveyance made for the purpose of hindering, delaying and defrauding future creditors is within the Statute and void, cannot be questioned.

Such a conveyance, though the grantor be wholly free from debt at the time, is within the terms and intent of the Statute.

If the finding of the referee amounts to a finding to that effect, it is not vital to its support that it should be expressed in the terms of the Statute.

He has been careful in this case to confine his exoneration of Phelps from fraudulent intent to his purpose in regard to existing creditors. As to subsequent creditors, he finds in other language what his actual purpose was.

Without reciting the report at length, the facts found by the referee may be condensed into the following statement: —

On the 18th December, 1854, Elbridge G. Phelps, being the owner of land, and a hotel thereon of the value of $5,500, but mortgaged for $3,500, and being indebted otherwise to the amount of $700, voluntarily, without any consideration, conveyed the same, mediately, to his wife, without any intent to defraud his then existing creditors, but with a view to engaging in a new business, and to secure the property for the benefit of himself and family, in the event of losses occurring therein. The deed, by which he parts with the title, is not placed upon record, and he and his family continue to occupy the property without any change in the possession or apparent ownership. He thereupon borrowed money; the plaintiff, without knowledge of such conveyances, and believing him still to own the premises, became surety for the repayment. He engaged in such new business, and therein sustained losses, and became insolvent.

The question thereupon arising, is this: Is the conclusion of the referee (declared by him to be a conclusion of law, from the foregoing facts), that such conveyance to the wife is fraudulent and void as against the plaintiff, erroneous?

In other words, may a person about to engage in business which he believes may involve losses, with a view to entering upon such business, convey his property to his wife, voluntarily, without consideration, to

secure it for the benefit of himself and family, in the event that such losses should occur?

I cannot regard this question, as in substance, other than the inquiry, may a man, for the purpose of preventing his future creditors from collecting their demands out of his property then owned, and *for the purpose* of casting upon them the hazards of his success in the business in which he is about to engage, convey his property without consideration to his wife, in order to secure the benefit of it to himself and family, however disastrous such business may prove, and continue in the possession, not even putting the deeds upon record, until after such subsequent indebtedness arises?

This, it will be seen, is not merely a question, whether a man may provide for his wife and family, and thereby protect them against the hazards of a business in which he is about to engage, but whether he may put aside property for the benefit of himself for such a purpose. For it is immaterial, that, if the property once became the lawful property of his wife, it would not, under our present laws, be subject to his control. The legal efficacy of the arrangement, which he makes to secure to himself the benefit of the property which he puts aside, is not the test of the validity of the transaction as against his creditors; the inquiry is, whether the conveyance (whether the plan and scheme be unskilfully or skilfully devised) was made to defraud creditors.

It seems to me, that the question above put can receive but one answer. The facts found constitute fraud, fraud in *fact*, in whatever terms it is expressed.

They, in substance, are a finding, that, with intent to defraud creditors whom he expected to owe, and whom possible losses might render him unable to pay, he made the conveyance for the purpose of securing the property to himself and family, remaining in the possession of the property, and in the apparent ownership. This is fraud in fact; and none the less because the referee did not give it that designation in terms. (*Stilman* v. *Ashdown*, 2 Atk. 481; 2 Story's Eq. Jur. § 356, and note; *Taylor* v. *Jones*, 2 Atk. 601; *Parish* v. *Murphree*, 13 How. [U. S.] 99; *Black* v. *Nease*, 37 Penn. 438; *Savage* v. *Murphy*, 8 Bosw. 97, and cases cited; *Carpenter* v. *Roe*, 10 N. Y. 227.)

Upon the ground that the finding of the referee amounts to a finding that the conveyances were made for the purpose of defrauding creditors, I think the order appealed from must be reversed, and the judgment entered on the report of the referee must be affirmed with costs.

Ordered accordingly.

PRATT *v.* CURTIS.

CIRCUIT COURT OF THE UNITED STATES. DISTRICT OF MASSACHUSETTS. 1871.

[*Reported* 2 *Lowell*, 87.]

Two bills in equity by the assignee of the firm of Curtis & Collamore, asking that certain conveyances made by Mr. Curtis about fifteen months before his bankruptcy should be set aside, and for other relief. The first suit related to certain lands in Charlestown, settled in trust for the children of the settlor, and alleged that the deed was voluntary; that Curtis, at the time of the settlement, was indebted to the plaintiff and others, who were still his creditors, and was embarrassed in his circumstances, and that the deed was made with intent to delay and defraud his creditors. The second bill was similar, excepting that it related to other lands, and that the conveyance was alleged to be for the benefit of the wife of Mr. Curtis, and that a purchaser of the lands from the trustees was made a party defendant. Demurrers were filed to both bills.

H. C. Hutchins and *H. H. Currier*, for defendants.

M. F. Dickinson, Jr., for plaintiff.

LOWELL, J. 1. In the courts of this State an assignee in insolvency must proceed at law for lands conveyed in fraud of creditors, unless the rights of more than two parties are involved, or some peculiarly equitable relief is required. But the equitable jurisdiction of the courts of the United States does not depend altogether upon the remedies given by the State courts. It is substantially the same throughout the country, and very nearly the same now that it was in 1789; and nothing is better settled than that this jurisdiction exists in those cases in which the chancery courts in England have concurrent jurisdiction with the courts of common law, and notably of bills by creditors to set aside deeds said to be voidable by them. *Shelton* v. *Tiffin*, 6 How. 163; *Bean* v. *Smith*, 2 Mason, 252; *Hagan* v. *Walker*, 14 How. 29. In respect to the second bill, it was admitted at the bar that the remedy at law might not be adequate; because, if Mr. Wiswall was a *bona fide* purchaser without notice, the trustees might still be held to account in equity for the purchase money, though the land would be beyond their reach: *Hubbell* v. *Currier*, 10 Allen, 337. But the decisions in the Federal courts do not turn on any such distinction.

2. The objection that the bill ought to point out the particular section of the bankrupt law which gives the plaintiff a right to set aside the deeds, is not sound. The plaintiff is to set out facts, and it would be bad pleading to allege the law. Perhaps the meaning of the objection is that the assignee in bankruptcy cannot avoid any transfers of property, but such as come within sect. 35, which these deeds do not,

because they were made more than six months before the bankruptcy. This is a mistake. That section refers only to frauds on the Act itself; but the assignee can, as a general rule, avoid any conveyances which the creditors could avoid. Thus in *Carr* v. *Hilton*, 1 Curtis, C. C. 233, it was decided that an assignee under the Bankrupt Act of 1841 could maintain a bill of this kind relating to lands conveyed by fraud before the passage of the Act, although that Act did not mention conveyances in fraud of creditors. So, under an insolvent law which had no express provision on the subject, Parke, B., said, "A deed which is void as against creditors is void as against those who represent creditors:" *Doe* v. *Ball*, 11 M. & W. 531. The Bankrupt Act, at sect. 14, vests in the assignee "all the property conveyed by the bankrupt in fraud of his creditors," — being intended, I suppose, to meet any possible doubt that might remain, notwithstanding the decisions.

3. Does the bill state a case of fraud on creditors? The defendants, very justly, draw a distinction between creditors at the time of the conveyance and those who become such afterwards. Under our laws, which require the recording of deeds for the very purpose of notifying creditors as well as purchasers, this general distinction, which is admitted in England, is highly just and equitable. It has been fully adopted by the courts of the United States in the cases cited. It is, however, the Statute of 13 Eliz., as adopted and construed in Massachusetts, which governs this case; and I have, therefore, examined the decisions of the State with some care. From them I derive the following propositions: 1. A voluntary conveyance to a wife or child is not fraudulent *per se;* but it is a question of fact in each case whether a fraud was intended. 2. Such a deed made by one who is considerably indebted is *prima facie* fraudulent, and the burden is on him to explain it. 3. This he may do by showing that his intentions were innocent, and that he had abundant means, besides the property conveyed, to pay all his debts. 4. If the deed was not in fraud of existing creditors, the burden of proof is on the subsequent creditors to show a fraud on them. *Thacher* v. *Phinney*, 7 Allen, 146; *Lerow* v. *Wilmarth*, 9 Id. 382; *Winchester* v. *Charter*, 12 Id. 606; s. c. 97 Mass. 140; 102 Id. 272.

These bills do not allege the facts which would be necessary to show a fraud on subsequent creditors only; but the rule is, that, if a deed is avoided by antecedent creditors, the land or its proceeds goes to creditors generally: *Walker* v. *Burrows*, 1 Atk. 94; *Townshend* v. *Windham*, 2 Ves. Sen. 11; *Jenkyn* v. *Vaughan*, 3 Drew. 419; *Whittington* v. *Jennings*, 6 Sim. 493. The case last cited went this length, — that a creditor whose account had been running when the voluntary settlement was made might set it aside, though the items of debt at the date of the deed had all been paid, the balance having always been increasing. I am not aware that the precise point has arisen in Massachusetts; but the *dicta* support the plaintiff's view, that if a conveyance is fraudulent as to existing creditors, it is so as to all: *Winchester* v.

Charter, 12 Allen, 609, per Bigelow, C. J. In England, there appears to be another rule in equity, that if there be nothing to impeach the settlement, excepting that it is voluntary, and no intent to defraud subsequent creditors is proved, they will not be permitted to impeach the deed, without showing one or more antecedent debts outstanding when the bill is filed: *Holloway* v. *Millard*, 1 Mad. 414; *Lush* v. *Wilkinson*, 5 Ves. 384. This doctrine is not easily to be reconciled with the other, nor with principle; because it makes the validity of the conveyance depend on matters arising *ex post facto*. It probably gained a footing in the courts at a time when all such conveyances were held to be absolutely fraudulent in law as against existing creditors, and was a sort of equitable mitigation of the rigor of that doctrine. Whether this is the law here I do not now inquire, because this bill alleges the existence of antecedent debts. Whether the grantor must be actually insolvent at the time, in order to render the conveyance fraudulent against existing creditors, has been disputed. In *Winchester* v. *Charter*, 12 Allen, 609, Bigelow, C. J., says that a voluntary transfer of property by a person deeply indebted, and whose property was inadequate "or barely sufficient" for the payment of his debts, would furnish strong presumptive evidence of fraud. At another place on the same page, he says it is necessary to show that he was indebted beyond his probable means of payment. In *Parish* v. *Murphree*, 13 How. 100, McLean, J., says, that, in case of a merchant, insolvency need not be proved: it is enough to show that his situation was such that a prudent man, with an honest regard to the rights of his creditors, could not have made such a settlement. I am much inclined to believe that if insolvency were distinctly proved as matter of fact, the intent to defraud existing creditors would follow as matter of law, because one who undertakes to make a voluntary conveyance must be presumed to know the state of his affairs. *Christy* v. *Courtenay*, 13 Beav. 96. It has been so held even in cases of preference; but the argument applies much more strongly to a gift, because a trader may often make payments of just debts in the ordinary course of business without any thought of his standing in respect to other creditors; but in making a gift, he undertakes to say that he is in a position to make it with justice to them. On the other hand, if insolvency is not clearly shown, the true inquiry, perhaps, is that put by Mr. Justice McLean, whether a prudent man, having a just regard to the rights of his creditors, would have permitted himself to do the act. These bills do not allege insolvency; but all the cases agree that if the grantor is much indebted, or is embarrassed, the burden of proof is on him to explain the transaction, if questioned by existing creditors; and these facts are alleged. It follows that the bills are sufficient to require the respondents to answer, unless their objection, that the deeds can be set aside only to the extent that may be necessary to pay antecedent debts, and that the assignee cannot work out this equity, is well taken. We have already seen that the doctrine of courts of equity in England is, that if

the deed is set aside the property becomes assets. I do not decide this point, however, because, in my opinion, the assignee in bankruptcy, and he only, has the right to impeach the deed in the interest of any class of creditors. Many cases might arise in which the only difficult point to be decided would be whether all the creditors, or only certain of them, were interested; and, upon the theory of the defence, it would depend upon the decision of that point whether the suit should stand or fall, though it was clear that the deed was fraudulent as to some creditors; while, if the assignee can bring the suit in either event, that difficulty is obviated. Assuming, therefore, that the law will only require antecedent creditors to be indemnified, for which I have not yet seen the authority, I rule that the assignee in bankruptcy is the only proper party plaintiff to impeach the deed: *Beals* v. *Clark*, 13 Gray, 18.

The second bill is defective, so far as Mr. Wiswall is concerned, in not alleging distinctly his participation in or knowledge of the fraud. He is not a necessary party to the bill; because the other defendants may be required to account for the proceeds of the sale to him, although his title should be found or be admitted to be unimpeachable. Indeed, Marshall, C. J., has said, in such a case, that no decree ought to be made against a purchaser, so long as there were volunteers before the court who were able to pay the debt. *Hopkirk* v. *Randolph*, 2 Brock. 132.

The demurrer is sustained as to the defendant Wiswall, with costs, unless the plaintiff chooses to amend within ten days, upon the terms of paying his costs up to this time.

The other defendants are to answer over in two weeks, their demurrer being overruled.

TODD *v.* NELSON.

COURT OF APPEALS OF NEW YORK. 1888.

[*Reported* 109 *N. Y.* 316.]

APPEAL from order of the General Term of the Supreme Court in the Second Judicial Department, made February 9, 1885, which reversed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

The nature of the action and the material facts are stated in the opinion.

H. D. Donnelly, for appellant.

M. L. Cobb, for respondent.

PECKHAM, J. This action was brought by the plaintiff to set aside and have declared void a deed said to have been executed by one

Emma D. Owen to Isaac Nelson and Mary Ann Nelson, her father and mother. The deed conveyed certain premises in the county of Westchester belonging to Mrs. Owen, and it was recorded in the clerk's office of that county within a few days after it was executed, which was on the 20th of December, 1862. In 1867 the grantor in the deed, who with her husband had continued to occupy the premises, executed a mortgage thereon to one Todd for the purpose of securing the repayment of $4,000. Subsequently another mortgage was executed by her to the same mortgagee for the purpose of securing the sum of $2,000 additional, made up in part of the interest due on the $4,000 mortgage, and the balance of cash advanced. Subsequently an action was commenced to foreclose both mortgages, which proceeded to judgment, and a decree of foreclosure was rendered and the premises were sold under that decree and bid in by the mortgagee. No judgment for deficiency was ever entered up against the mortgagor. The mortgagee, having received the referee's deed, upon seeking to obtain possession was confronted with the deed of the premises executed in 1862 to said Nelson and his wife, and he found defendant Isaac Nelson (his wife having died) in possession, claiming to own the premises by virtue of said deed.

This action was tried before a judge without a jury and resulted in a judgment for the plaintiff, setting aside the deed from Mrs. Owen to her father and mother, and adjudging the title to have been in her at the time of the execution by her of the mortgages above mentioned, and adjudging that the plaintiff was entitled to the immediate possession of the said premises. An appeal from that judgment was taken to the General Term, where it was reversed, and a new trial granted, but the order granting such new trial did not state that the judgment was reversed on questions of fact.

The first question which arises here is upon the finding of fact made by the trial judge, that the deed from Mrs. Owen to her father and mother was never delivered by Mrs. Owen to them or either of them, nor did she ever authorize any other person to deliver such deed to said grantees or either of them. As the judgment of the Special Term was not reversed on any question of fact, if there were any evidence to support the finding above stated it is conclusive upon us upon this appeal. But if there were none and an exception was duly taken to the findings, a question of law is raised which is reviewable here.

[The Court of Appeals determined that there was no evidence to support such a finding. This part of the opinion is omitted.]

The finding of non-delivery being thus an error of law, the General Term was right in granting a new trial, and we must affirm the order unless it shall appear that upon the other findings in the case, assuming there was a delivery of the deed, the judgment of the trial court was necessarily correct.

This makes it necessary to look still further into the record, and the first question that meets us is as to the finding of the trial court upon

the question of fraud. If there were a delivery of the deed, and no fraud in its purpose, of course that is an end of the case, and it is not necessary to inquire further as to whether the action could be maintained if there were a delivery of the deed and a fraudulent purpose accompanying it on the part of the grantor. The court found that prior to September, 1862, it was known to her parents that their daughter, Mrs. Owen, then Mrs. Vernal, was about to marry, and that, in such event, she intended to occupy and carry on the farm she owned through the agency of her intended husband, John Owen. It was further found that the parents and daughter, believing the marriage was hazardous, and that indebtedness would arise and losses be sustained, with a view to entering into the marriage and engaging in the farming business and to save the farm to Mrs. Owen, and protect the same from her future creditors, agreed that the daughter should convey the farm to her parents, and they promised to hold the title to the same in trust for her, and she should continue in possession of the premises and enjoy the proceeds and income thereof, and in pursuance of such agreement the deed was executed and soon thereafter she went into the occupation of the farm with her husband, engaged in the business of farming and sustained heavy losses therein and became totally insolvent. The court further found that the deed was colorable only and made with intent to defraud the creditors of the grantor, and with intent to defraud the subsequent mortgagee, the plaintiff's intestate. These findings were duly excepted to by defendant's counsel.

Of course the same rule holds in this instance, as was stated in regard to the finding made by the trial court, that there was no delivery of the deed, and if there be any evidence to sustain these findings of fraud we are concluded by them. A careful examination of the whole evidence in the case satisfies us that there is none upon which the finding of the learned trial judge can be based. The court found (and the evidence upon that point fully sustains the finding), that at the time when this deed was delivered the grantor owed no debts whatever, and she had, in addition to the farm in question, some personal property and money which together amounted in value to $19,000, and the deed was placed on record within four days of its execution. The theory upon which deeds conveying the property of an individual to some third party have been set aside as fraudulent in regard to subsequent creditors of the grantor has been that he has made a secret conveyance of his property while remaining in the possession and seeming ownership thereof, and has obtained credit thereby, while embarking in some hazardous business requiring such credit, or the debts which he has incurred were incurred soon after the conveyance, thus making the fraudulent intent a natural and almost a necessary inference, and in this way he has been enabled to obtain the property of others who were relying upon an appearance which was wholly delusive. Such are the cases cited by the learned counsel for the appellants.

But here the grantor was not about to engage in business, within the

meaning of that term as used in the cases. She was simply going to live on the farm with her husband, and presumably off the products thereof. She had $19,000 in personal property, and the farm was then worth about $6,000. She was wholly free from debt. The deed was placed on record at once. It was four years and four months thereafter before the first of the mortgages was executed to plaintiff's intestate, and eight years and four months before the second was executed.

Under such circumstances, we think, it is too much to say that there was any evidence at the time she executed the deed that the grantor meant to defraud creditors. On the contrary, no such inference can be drawn. The parties evidently (or at least the mother) were fearful in regard to the marriage, and decided that at least some part of the property which she possessed should be saved to the grantor from the husband's possible future misfortunes. That years after the execution of the deed, which was on record, the grantor, at the request of her husband, should mortgage the farm, and should make an affidavit that she was the owner thereof, however it may show an intent to defraud the mortgagee at that time, does not, as we think, show that the purpose of the deed, executed more than four years prior thereto, at a time when she was largely solvent, was to defraud this mortgagee or any subsequent creditors, not one of whom was shown to exist earlier than the above-stated time of more than four years from the execution of the deed. She swears distinctly that her purpose was to give the farm freely and wholly to her parents and the survivor, and she may have felt full confidence in their intention to treat her with kindness.

We have not gone at length into the evidence. On the contrary, we have given only a partial review of it, and we feel convinced that it cannot be regarded as furnishing any support for the finding of fraud as made by the trial court. This conclusion renders it unnecessary to enter upon the examination of any further question in the case. The deed being delivered and there being no fraudulent purpose which caused its delivery, the title was in the grantees at the time Mrs. Owen assumed to mortgage the farm, and the plaintiffs cannot maintain this action. The equities in favor of the plaintiffs are very strong indeed. Their intestate advanced his money believing his mortgage was a lien on the farm. But he had the opportunity at all times before loaning any money to resort to the record in the clerk's office, and the least attention given thereto would have led to the discovery of this deed. He saw fit to trust to the declarations of Mrs. Owen, and these plaintiffs must sustain a heavy loss in consequence thereof.

The order of the General Term granting a new trial must be affirmed, and judgment absolute rendered against the plaintiffs in accordance with their stipulation, with costs.

All concur, except EARL and GRAY, JJ., dissenting.

Order affirmed and judgment accordingly.

SECTION II.

CONVEYANCES IN FRAUD OF PURCHASERS.

St. 27 Eliz. c. 4 (1585). — Forasmuch as not only the Queen's most excellent Majesty, but also divers of her Highness' good and loving subjects, and bodies politic and corporate, after conveyances obtained, or to be obtained, and purchases made or to be made, of lands, tenements, leases, estates and hereditaments, for money or other good considerations, may have, incur and receive great loss and prejudice by reason of fraudulent and covinous conveyances, estates, gifts, grants, charges and limitations of uses heretofore made or hereafter to be made, of, in or out of lands, tenements or hereditaments so purchased or to be purchased: (2) which said gifts, grants, charges, estates, uses and conveyances were, or hereafter shall be, meant and intended by the parties that so make the same to be fraudulent and covinous, of purpose and intent to deceive such as have purchased or shall purchase the same; (3) or else by the secret intent of the parties the same be to their own proper use, and at their free disposition, (4) colored nevertheless by a feigned countenance and show of words and sentences, as though the same were made *bona fide*, for good causes, and upon just and lawful considerations:

II. For remedy of which inconveniences, and for the avoiding of such fraudulent, feigned and covinous conveyances, gifts, grants, charges, uses and estates, and for the maintenance of upright and just dealing in the purchasing of lands, tenements and hereditaments; (2) be it ordained and enacted by the authority of this present parliament, That all and every conveyance, grant, charge, lease, estate, encumbrance and limitation of use or uses, of, in or out of any lands, tenements or other hereditaments whatsoever, had or made any time heretofore sithence the beginning of the Queen's Majesty's reign that now is, or at any time hereafter to be had or made, for the intent and of purpose to defraud and deceive such person or persons, bodies politic or corporate, as have purchased or shall afterwards purchase in fee-simple, fee-tail, for life, lives or years, the same lands, tenements and hereditaments, or any part or parcel thereof, so formerly conveyed, granted, leased, charged, encumbered or limited in use, (3) or to defraud and deceive such as have or shall purchase any rent, profit or commodity in or out of the same, or any part thereof, (4) shall be deemed and taken only as against that person and persons, bodies politic and corporate, his and their heirs, successors, executors, administrators and assigns, and against all and every other person and persons lawfully having or claiming by, from or under them, or any of them, which have

purchased or shall hereafter so purchase for money or other good consideration, the same lands, tenements or hereditaments, or any part or parcel thereof, or any rent, profit or commodity in or out of the same, to be utterly void, frustrate and of none effect; (5) any pretence, color, feigned consideration, or expressing of any use or uses to the contrary notwithstanding.

III. And be it further enacted by the authority aforesaid, That all and every the parties to such feigned, covinous and fraudulent gifts, grants, leases, charges or conveyances before expressed, or being privy and knowing of the same or any of them, which after the twentieth day of April next coming shall wittingly and willingly put in ure, avow, maintain, justify or defend the same or any of them, as true, simple, and done, had or made, *bona fide*, or upon good consideration, to the disturbance or hindrance of the said purchaser or purchasers, lessees or grantees, or of or to the disturbance or hindrance of their heirs, successors, executors, administrators or assigns, or such as have or shall lawfully claim anything by, from or under them, or any of them shall incur the penalty and forfeiture of one year's value of the said lands, tenements and hereditaments so purchased or charged; (2) the one moiety whereof to be to the Queen's Majesty, her heirs and successors, and the other moiety to the party or parties grieved by such feigned and fraudulent gift, grant, lease, conveyance, encumbrance or limitation of use, to be recovered in any of the Queen's courts of record, by action of debt, bill, plaint or information, wherein no essoin, protection or wager of law shall be admitted for the defendant or defendants; (3) and also being thereof lawfully convicted, shall suffer imprisonment for one half year without bail or mainprise.

IV. Provided also, and be it enacted by the authority aforesaid, That this Act or anything therein contained shall not extend or be construed to impeach, defeat, make void or frustrate any conveyance, assignment of lease, assurance, grant, charge, lease, estate, interest or limitation of use or uses, of, in, to or out of any lands, tenements or hereditaments heretofore at any time had or made, or hereafter to be had or made, upon or for good consideration and *bona fide*, to any person or persons, bodies politic or corporate; anything beforementioned to the contrary hereof notwithstanding.

V. And be it further enacted by the authority aforesaid, That if any person or persons have heretofore sithence the beginning of the Queen's Majesty's reign that now is, made or hereafter shall make any conveyance, gift, grant, demise, charge, limitation of use or uses, or assurance of, in or out of any lands, tenements or hereditaments, with any clause, provision, article or condition of revocation, determination or alteration, at his or their will or pleasure, of such conveyance, assurance, grants, limitations of uses or estates of, in or out of the said lands, tenements or hereditaments, or of, in or out of any part or parcel of them, contained or mentioned in any writing, deed or indenture of such assurance, conveyance, grant or gift; (2) and after

such conveyance, grant, gift, demise, charge, limitation of uses or assurance so made or had, shall or do bargain, sell, demise, grant, convey or charge, the same lands, tenements or hereditaments, or any part or parcel thereof, to any person or persons, bodies politic and corporate, for money or other good consideration paid or given (the said first conveyance, assurance, gift, grant, demise, charge or limitation, not by him or them revoked, made void or altered, according to the power and authority reserved or expressed unto him or them in and by the said secret conveyance, assurance, gift or grant), (3) That then the said former conveyance, assurance, gift, demise and grant, as touching the said lands, tenements and hereditaments, so after bargained, sold, conveyed, demised or charged, against the said bargainees, vendees, lessees, grantees and every of them, their heirs, successors, executors, administrators and assigns, and against all and every person and persons which have, shall or may lawfully claim anything, by, from or under them or any of them, shall be deemed, taken and adjudged to be void, frustrate, and of none effect, by virtue and force of this present Act.

VI. Provided nevertheless, That no lawful mortgage made or to be made *bona fide*, and without fraud or covin, upon good consideration, shall be impeached or impaired by force of this Act, but shall stand in the like force and effect as the same should have done if this Act had never been had nor made; anything in this Act to the contrary in any wise notwithstanding.

GOOCH'S CASE.

Queen's Bench. 1590.

[*Reported* 5 *Co.* 60 *a.*]

And in this case,[1] Wray, Chief Justice, said, if A. seised of land in fee makes a fraudulent conveyance, to the intent to deceive and defraud purchasers against the Stat. of 27 El. and continues in possession, and is reputed as owner, B. enters into discourse with A. for the purchase of it, and by accident B. has notice and knowledge of this fraudulent conveyance and notwithstanding concludes with A. and takes his assurance of him; in this case B. shall avoid the said fraudulent conveyance by the said Act, notwithstanding his notice; for the Act has by express words made the fraudulent conveyance void as to a purchaser; and forasmuch as it is within the express purview of the Act, it ought to be so taken and expounded in suppression of fraud. And according to the opinion of the Lord Wray, it was unanimously agreed and resolved by the whole Court of Common Pleas, Pasch. 3 Jacobi in evidence to a jury in an *Ejectione firmæ*, on a lease made by

[1] Only an extract is printed from this case.

Standen to House, plaintiff, against Bullock, defendant, that where one Bullock had made a fraudulent estate of his land within the said Act of 27 El. to A. B. and C. and afterwards notwithstanding offered to sell the said land to Standen, and before assurance thereof made by Bullock, Standen had notice of the said fraudulent conveyance, and notwithstanding proceeded and took his assurance of Bullock that Standen should avoid (by the said Act) the said fraudulent conveyance; for the notice of the purchaser cannot make that good which an Act of Parliament made void as to him. And true it is, *quod non decipitur qui scit se decipi.* But in that case the purchaser is not deceived; for the fraudulent conveyance whereof he has notice is void as to him by the said Act, and therefore shall not hurt him, nor is he, as to that, in any manner deceived.

COLVILE *v.* PARKER.

King's Bench. 1607.

[*Reported Cro. Jac.* 158.]

Information upon the Statute of 27 Eliz. *c.* 4, of fraudulent conveyances. Upon evidence to the jury, *Tanfield* cited it to be adjudged in one *Woodie's Case*, where one after marriage voluntarily assigned a lease of years *quasi* in jointure for his wife, and took the profits, and afterwards sold it to one who had not any notice of this conveyance, that it was within the Statute, although at first it was not made upon trust to be revoked, nor any clause of revocation therein, because it was a voluntary conveyance at first, and shall be intended fraudulent at the beginning: but if at the time of the marriage or afterwards, by reason of a portion given by his wife's friends in recompense thereof, and for a provision for the maintenance of his wife, he had made an assignment of such a lease to his wife's friends, and had afterwards taken the profits thereof (as in reason he ought during his life), and then had sold that term, yet it had not been within the Statute.[1]

DOE d. NEWMAN *v.* RUSHAM.

Queen's Bench. 1852.

[*Reported* 17 *Q. B.* 723.]

Ejectment. On the trial, before *Martin*, B., at the Wiltshire Spring Assizes, 1851, the verdict passed for the plaintiff, subject to leave to move to enter a verdict for the defendant.

[1] Cf. *Doe* d. *Otley* v. *Manning*, 9 East, 59 (1807).

Crowder, in the ensuing term, obtained a rule *nisi* accordingly, against which, in Trinity Term, 1851, *Montague Smith* showed cause;[1] and *Crowder* and *Barstow* were heard in support of the rule. The facts and arguments are so fully stated in the judgment as to render any more detailed report unnecessary.

Cur. adv. vult.

Lord Campbell, C. J., now delivered the judgment of the court.

The facts appear to be as follows.

John Newman, being seised in fee, by deed, 3d July, 1833, covenanted to stand seised to himself for life, remainder to Sarah Newman (his daughter-in-law) for life, remainder to George Newman (his grandson), the lessor of the plaintiff, in fee. On 16th March, 1844, John Newman made his will, and devised the premises to Sarah Newman for life, remainder to Thomas Morse in fee.

John Newman was buried on 19th March, 1844. On the 5th April, 1847, Sarah Newman and Thomas Morse sold and conveyed the premises to the defendant for £100. Sarah Newman died on 2d May, 1849.

A verdict was found for the plaintiff; and a rule *nisi* has been obtained to enter a verdict for the defendant.

The deed of John Newman is admitted to be voluntary: and the question is, Whether the defendant is such a purchaser, within Stat. 27 Eliz. c. 4, as to be entitled to treat that deed as fraudulent and void.

The principle on which voluntary conveyances have been held uniformly to be fraudulent and void as against subsequent purchasers appears to be, that, by selling the property for a valuable consideration, the seller so entirely repudiates the former voluntary conveyance, and shows his intention to sell, as that it shall be taken conclusively, against him and the person to whom he conveyed, that such intention existed when he made the conveyance, and that it was made in order to defeat the purchaser. Such deeds have been held fraudulent and void as against such purchasers even when they have had notice of them; *Doe dem. Otley* v. *Manning*, 9 East, 59. Where the same person executes the voluntary conveyance and afterwards sells and conveys the property, the application of the principle is obvious and easy. But where the seller is a different person from him who executed the voluntary conveyance it is quite otherwise; for the acts of one man cannot show the mind and intention of another.

The question, Whether the Statute of Elizabeth applies to a purchaser from the heir or devisee of one who has made a voluntary conveyance, is discussed in the last edition of Sugden On Vendors and Purchasers, p. 927, *et seq.* (11th ed.), and the authorities are there collected. The learned author concludes by observing (p. 928): "Still the rule has never been carried to this extent, that a father's *bona fide*

[1] *28th May.* Before Lord Campbell, C. J., Patteson, Coleridge, and Erle, JJ. — Rep.

conveyance of the fee or of any partial interest, although voluntary, can be set aside by a sale by the devisee or heir at law of the father. The rule properly confined to transactions really fraudulent, or fraudulently kept on foot, seems to be open to no solid objection, and it is not likely to be carried further."

Burrel's Case, 6 Rep. 72 *a*, is supposed to have decided this point in favor of the purchaser from a person different from him who made the voluntary conveyance. The facts of that case, however, do not warrant any such conclusion. There, the grandfather, on the marriage of the father, covenanted to demise the premises in question to the father, and by indenture afterwards did demise them to the father for 1000 years. The father, seven years afterwards, assigned the lease to his son, then an infant, to the intent that it should not be merged by descent of the reversion, and with a colorable intent that the infant should pay debts: the grandfather died; the father entered and took the profits; and nothing was done by the son under the assignment of the lease. Afterwards the father sold the land in fee to a purchaser for a large sum of money: and it was held that the purchaser should avoid the lease for 1000 years, and the assignment. Now it is obvious that it was quite sufficient to avoid the assignment of the lease by the father; for, as soon as that assignment was out of the way, the lease for 1000 years would be merged in the inheritance, and so there was nothing on which it was necessary that the Statute of Elizabeth should operate but the voluntary assignment which was made by the same person who afterwards sold and conveyed the fee to a purchaser.

Certainly the report states the first resolution in the case to be that (6 Rep. 72 *b*) "it is not necessary that he who sells the land should make the former fraudulent estate, or encumbrance; but, be the estate, &c., fraudulent *ut supra*, whosoever sells (makes) it, the purchaser shall avoid such fraudulent estate, &c." The resolution is entitled to great respect: but, as it goes beyond what is required by the facts of the case, we do not consider it to be conclusive.

And, further, the second resolution in *Burrel's Case* is quite in accordance with the view we have just taken; for it is there said: "It was resolved, that although the father had nothing in the inheritance of the land at the time of the assignment of his term, but the whole estate of inheritance was then in the grandfather; yet when the grandfather died, and the father sold the land, his vendee shall avoid the said term by the said Act (the said assignment on the evidence being taken to be fraudulent), for if he had bargained and sold the said term only, the bargainee should have avoided the said fraudulent assignment, and by consequence the vendee of the whole fee simple shall avoid it." Now, if the term only had been sold, it would plainly have been sold by the same person who made the fraudulent assignment.

In the case of *Richards* v. *Lewis* and *Doe dem. Richards* v. *Lewis* (reported in the 15th volume of the Jurist, p. 512, and in 20 Law J. N. S., Com. P. 177) the Court of Common Pleas commented upon

Burrel's Case, 6 Rep. 72 *a*. The first action was detinue for title deeds; the second for the land itself. The facts were as follows. Mrs. Joseph, having a lease for years, in May, 1829, by a voluntary conveyance in contemplation of marriage with Mr. Saunders, but without his knowledge, conveyed to trustees for herself for life, with remainder to her son Rhys Morgan by a former marriage, and, if he should die without leaving issue, to Llewellyn Jenkins absolutely. She afterwards married Mr. Saunders; and, in 1837, she and her husband conveyed to Howard as trustee for themselves and the survivor for life, with remainder to Rhys Morgan absolutely. Rhys Morgan died, without issue, in 1841, having disposed of the remainder, which he considered he had absolutely under the deed of 1837, to the lessor of the plaintiff, who before the action took an assignment from Howard the trustee of the legal interest. In December, 1840, Mrs. Saunders, having survived her husband, by deed of assignment mortgaged the term to the defendant, concealing from him the previous settlements. In 1842 she died, having bequeathed the term to Llewellyn Jenkins, who, in 1843, conveyed the equity of redemption, and all his interest in the term, to the defendant. The plaintiff had a verdict in each case. In the action of ejectment the court held that the deed of 1829 was good; and that Mrs. Saunders, at the time of her marriage, had only a life estate; that her husband could not be considered as a purchaser within the Statute of Elizabeth; and that, on Mrs. Saunders's death, the conveyance by her and her husband in 1837 and her mortgage in 1840 were at an end; and the defendant by the conveyance from Llewellyn Jenkins had established his title: therefore a nonsuit was directed. This decision does not touch the resolution in *Burrel's Case*. In the action of detinue a new trial was directed on the ground of surprise as to the question of sufficient search having been made for the deed of 1829. In that case it was urged by counsel for the defendant that, as the deed of 1829 was not proved, the defendant was entitled; for that the deed of 1837 was voluntary only, and was done away with by the subsequent mortgage in 1840; and for this *Burrel's Case* was relied on. The court considered that, by the deed of 1837, the husband had divested all the wife's interest: and the case did not therefore turn on *Burrel's Case:* but in the course of the argument Mr. Justice Williams said: "Suppose a devise by the person making the voluntary conveyance, could his devisee, or his heir, revoke it by a sale? Where there is no actual fraud, must not the revoking conveyance be made by the same person who made the voluntary conveyance?"[1] The Lord Chief Justice Jervis also, in giving judgment, said:[1] "*Burrel's Case* is misunderstood." "It does not appear that the courts at that time held mere *voluntariness* a badge of fraud; they do not say that every voluntary deed is fraudulent. Lord Coke says, 'I acquainted Popham, C. J., with this resolution, and he allowed well of it, and said it was well

[1] 15 Jurist, 513, 514. The report of the judgment in 11 Com. B. 1035, corresponds in effect with that in the Jurist, but does not contain the same language. — Rep.

done to construe the said Act in suppression of fraud; and (as he told me) it was adjudged before him and his companions, Justices of the King's Bench, that where a man in a secret manner made an estate to the use of his wife for her jointure, by fraud and covin, to defeat a purchaser, to whom he intended to sell the land, that in such case, *if the fraud be proved in evidence, or confessed in pleading*, the purchaser should avoid such estate.' It is clear from this that cases of actual fraud alone were in their consideration. It is plain the deed was proved to be fraudulent *in fact* there, and not that the subsequent execution of a deed for a valuable consideration was deemed to stamp a prior voluntary deed with fraud. There was fraud in fact there, and not merely fraud in law." Mr. Justice Williams also, in giving judgment, said (15 Jurist, 515): "As to the mortgage, *Burrel's Case*, if good law, shows, that where there is *actual* fraud in a conveyance, a subsequent purchase from one not guilty of the fraud is protected; but that case has no application where the fraud is only constructive. I agree with the opinion of Wigram, V. C.; the consequence of holding otherwise would be, that if a father, wishing to disinherit an undeserving heir at law, made in his lifetime a conveyance by way of gift to his younger children, the heir upon his death might nevertheless nullify this deed by a sale, and pocket the purchase-money."

The opinion alluded to of Vice-Chancellor Wigram is to be found in *Parker* v. *Carter*, 4 Hare, 400; but it does not appear by the report on what ground the learned Vice-Chancellor proceeded. There, a sale had been made by a surviving wife of her own lands after a voluntary deed and fine by husband and wife; and it was contended that the Statute of Elizabeth applied, and *Burrel's Case* was relied on. Two answers were made: 1st. That the deed and fine were not voluntary, for that the joining by husband and wife was a good consideration for the act of each. 2d. That the sale was not by the same party. The Vice-Chancellor merely said that the objection was answered, but did not say on which ground.

No other case is reported, so far as we have been able to find, in which this point has been determined one way or the other, except that of *Jones, Lessee of Moffett*, v. *Whittaker*, Longfield & Townsend's Irish Exchequer Reports, 141. There William Smith, by a voluntary deed, in 1820, conveyed after his death to Barton Smith in fee; then, by another voluntary deed, in 1828, he conveyed after his death to Richard Smith in fee; then, by a third deed, in 1830, he conveyed to the defendant, professedly for £500, expressed to be paid in money and £300 in bonds. Richard Smith became bankrupt in 1837; and, in 1839, his assignees sold to the plaintiff for valuable consideration. William Smith died in 1840; and, the defendant having got into possession, the plaintiff brought his ejectment. The jury found that no money was paid, or bonds given by the defendant, and the deed to him, in 1830, was really fraudulent, and made colorably, to defeat the deed to Richard Smith, in 1828. But the defendant contended that, though he had

no title himself, the lessor of the plaintiff had none, for he claimed under a voluntary conveyance to Richard Smith, in 1828, which could not defeat the voluntary conveyance to Barton Smith in 1820. The case was tried before Richards, B.; and the plaintiff had a verdict; and, on motion to set it aside and enter a verdict for the defendant, the court held that the plaintiff was entitled to recover, saying that it was held in *Burrel's Case*, and ever since, that a purchaser for value should avoid a prior voluntary conveyance, although made by a different person from the seller to him. The Chief Baron Brady is reported to have stated that the defendant was grantee of a prior deed, executed for a voluntary consideration, which is a mistake of fact, though it is not material to the legal point. Baron Richards puts it thus: "The defendant relies upon an instrument founded on fraud; not only as under the Statute but as being actually fraudulent. I certainly was myself of opinion that this instrument was obtained in the year 1830, from a weak old man, and by gross contrivances for a very unworthy purpose; and so far as the application to set aside this verdict goes, I think it should be refused." This observation shows only the weakness of the defendant's own title; but it does not touch the question as to the infirmity of the plaintiff's title, on which the defendant had a right to insist. If there had been no prior deed of 1820 to Barton Smith, and the deed to Richard Smith, though voluntary, had been the first in order of time, no doubt it would have prevailed against the defendant's deed of 1830, because that deed was fraudulent in fact; and it would also have prevailed against any, even *bona fide*, sale and conveyance made *after* 1839, when Richard Smith's assignees sold for value, because it has been constantly held that if the person to whom a voluntary conveyance is made sells and conveys for value, that which was in its creation a voluntary conveyance, and voidable by a purchaser, becomes good and unavoidable by matter *ex post facto*, and will be considered as made upon valuable consideration; *Prodgers* v. *Langham*, 1 Sid. 133, and other cases, cited in Sugd. Vendors and Purchasers, p. 937 (11th ed.). This, however, is not by the operation of the Statute of Elizabeth, but rather by excluding that operation.

The case of *Jones, Lessee of Moffett*, v. *Whittaker* is doubtless an authority for the defendant in this case: but, with the most sincere respect for the learned judges by whom it was decided, we cannot consider it as good law. It would go the length of holding that, if there be ten voluntary conveyances, by the same man, to ten different individuals, whichever of them could first contrive to sell the property should prevail against the others. When a man who has made a voluntary conveyance afterwards sells to a *bona fide* purchaser, it may well be considered that, as the Statute avoids the voluntary conveyance, the seller always had the estate in him, and has, at the time of the sale, that which he can convey to the purchaser: but it does not follow that he has any estate in him which he can convey to any one *but* a purchaser for value. He clearly has not any such estate. Therefore

in the case of *Jones, Lessee of Moffett*, v. *Whittaker*, William Smith had not any estate in 1828 which he could convey to Richard Smith (Richard not being a purchaser for value); for he had already conveyed away the estate to Barton Smith. So, in the present case, John Newman, when he made his will in 1844, had no estate which he could devise to Thomas Morse; for he had already conveyed it to the lessor of the plaintiff; and, if Thomas Morse took nothing under the will, how is it possible that by selling to the defendant he could convey anything to him? We presume it is not supposed that a second grantee without consideration, or a devisee, the testator having before his will conveyed away his interest without consideration, has a power of appointment in favor of a purchaser for value, although no legal interest in the property has ever vested in him.

When we consider the consequences which would follow from the doctrine contended for as regards a purchaser from an heir, we may well pause before we assent to it. We may put such a case as the following: A., tenant for life of large estates under his marriage settlement, with remainder to his first son in tail, has also unsettled estates in fee. He has several sons and daughters. He makes a voluntary conveyance of his unsettled estates to himself for life, remainder to his younger children. A. dies. His eldest son succeeds to the large settled estates under the marriage settlement of his father. It is plain that he takes nothing in the others, either as heir or otherwise. But he makes a sale of those others to a *bona fide* purchaser. According to the doctrine contended for, the purchaser shall avoid the father's voluntary deed, and take away from the younger children the estates in which their father had the fee and had conveyed it to them. The eldest son shall put the purchase money into his pocket, and his brothers and sisters shall be beggars. This is a monstrous consequence; and yet there is no escaping from it, if the doctrine contended for be law.

There is indeed this difference between the case of a purchaser from an heir and that of a purchaser from a devisee, that, in the former case, the ancestor has done no act whereby he has shown any intention to repudiate his voluntary conveyance, whereas in the latter the testator has done such an act by the devise in his will.

But that act of devising does not show any intention in his mind to sell the property, nor that his devisee shall sell it. It does not show that he at any time contemplated a sale; and therefore it cannot, by reference to the time of the voluntary conveyance being made, raise the inference that he intended to defraud purchasers. In truth neither heir nor devisee in such a case has any estate in him, and therefore cannot possibly pass any to a purchaser.

The case of *Warburton* v. *Loveland*, 2 Dow & Clark, 480, in the House of Lords, was much relied on in the decision of *Jones, Lessee of Moffett*, v. *Whittaker*. That case, however, turned on the Registry Acts, and on the construction to be put on the express enactments

contained in them. It was held that want of registry made all deeds affected by it void as against purchasers, not only from the persons making those deeds, but from those who were entitled to the estates supposing those deeds not to have been made. Upon reading the opinion of the judges delivered by Tindal, C. J., in that case, it will be found to turn entirely upon the particular Acts of Parliament under discussion, and not to be any authority for the doctrine now contended for under the Statute of Elizabeth.

Upon the whole, we are all clearly of opinion that a purchaser from the devisee of one who has made a voluntary conveyance in his lifetime is not within the Statute, and that this rule to enter a verdict for the defendant must be discharged.

We have deferred giving judgment in this case for several terms, from our respect for the decision of the Irish Court of Exchequer in *Jones, Lessee of Moffett*, v. *Whittaker*, and from a desire, after an attentive examination of all the authorities upon the subject, to state fully the grounds on which we feel ourselves bound to differ from that decision. Having heard of a misconception which arose on a former occasion when I objected to the citation of a decision of an Irish court on a mere point of practice, I beg now to state that, in my opinion, the defendant's counsel were fully justified in citing this decision of an Irish court on the construction of an Act of Parliament which is common to both parts of the United Kingdom. Our procedure and theirs are regulated by different Statutes, different rules and different usages; and on mere questions of procedure no assistance can be derived in one island from the decisions of the courts in the other. But in considering questions arising on Statutes, or on the great principles of jurisprudence, which we have to interpret in common, I will take upon myself to say that we shall always be pleased to have assistance from the decisions of our learned brethren in Ireland, and that we shall treat with the same deference a judgment pronounced in any of the four courts in Dublin as if it had been pronounced in Westminster Hall.

Rule discharged.[1]

BEAL *v.* WARREN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1854.

[*Reported* 2 *Gray*, 447.]

ACTION OF TORT for breaking and entering the plaintiff's close, and cutting and carrying away ten cords of wood. Answer, title in Azel H. Warren, one of the defendants.

At the trial in the Court of Common Pleas, before *Hoar*, J., the plaintiff gave in evidence a deed from Simeon Warren, dated May 21st 1851, and recorded the next day, purporting to be made in consideration of

[1] So *Lewis* v. *Rees*, 3 K. & J. 132 (1856).

$500 paid to the grantor, and to convey the premises to Ruth F. Quindley (then and still a married woman), "to have and to hold the same to her, her heirs and assigns, forever, and to her and their own use and behoof forever, and to be held by her, without the intervention of a trustee, to her sole and separate use, free from the interference or control of her husband, agreeably to the Statute in such cases provided." It was admitted that the defendants could prove, if competent, that no consideration was actually paid for this deed.

The plaintiff also proved that Mrs. Quindley occupied the premises from the time of receiving this deed until the 11th of November 1851, when she made a deed thereof (in which her husband did not join) to the plaintiff, in consideration of $500 actually paid to her, and this deed was duly recorded, and the plaintiff took immediate possession of the premises. The defendants offered to prove that the plaintiff knew, at the time of purchasing the premises and taking this deed, that the conveyance to Mrs. Quindley was without consideration; but the judge ruled that such evidence would be immaterial.

The defendants gave in evidence a deed of the premises from Simeon Warren to Azel H. Warren, his son and co-defendant, dated February 4th 1852, and recorded the next day; and proved that the consideration thereof was $800, actually paid. The wood was cut by the defendants in the ensuing March.

The judge "instructed the jury that the deed from Simeon Warren to Mrs. Quindley, the grantor not being shown to be indebted at the time, gave a good title to the grantee, against subsequent purchasers for a valuable consideration, unless intended to defraud creditors, and impeached on that ground."

The defendants excepted.

J. J. Clarke, for the defendants.

N. C. Berry, for the plaintiff.

THOMAS, J. 1. The deed from Simeon Warren to Mrs. Quindley was a voluntary deed of gift, the grantor not being indebted at the time of the grant, and no actual intent to defraud future creditors being charged or shown. The estate was subsequently conveyed to one of the defendants, Azel H. Warren, by Simeon Warren, for a valuable consideration. No question is made whether the second grantee had actual notice of the first conveyance, though from the relation of the parties, and from the fact that there was no attempt to show actual fraud, such notice may reasonably be inferred. Nor would this be, in the absence of fraud, material; for the registration of the conveyance would be constructive notice, and sufficient notice, to all subsequent purchasers. The question is then, for the first time, to be directly determined in this commonwealth, whether a voluntary conveyance, made in good faith, and not affecting creditors, is good as against a subsequent purchaser for a valuable consideration.

In the precise form in which the proposition is stated by the learned judge of the Common Pleas there might be some difficulty. He "in-

structed the jury that the deed from Simeon Warren to Mrs. Quindley, the grantor not being indebted at the time, gave a good title to the grantee, against subsequent purchasers for a valuable consideration, unless intended to defraud creditors, and impeached on that ground." Of course, the learned judge did not intend to say that it might not be impeached by showing that it was made with the intent and purpose of defrauding the subsequent purchaser; for this is the specific evil against which it was the object of the Statute of 27 Eliz. *c.* 4, § 2, as distinguished from the St. 13 Eliz. *c.* 5, § 2, to guard. For example, A. makes a voluntary gift to his son B. with a fraudulent purpose to deceive C., to whom he proceeds at once to sell and convey the same estate, for a valuable consideration. The first conveyance would be void, as against the second, though the grantor was not indebted, and had no intent to defraud creditors. Indeed, it has been held by some of the courts that under St. 27 Eliz. *c.* 4, the intent to defraud creditors only would not make void a voluntary gift as against a subsequent purchaser for a valuable consideration; but that the gift must be made with the specific intent of defrauding subsequent purchasers. *Foster* v. *Walton*, 5 Watts, 378. *Douglas* v. *Dunlap*, 10 Ohio, 162. *Sanger* v. *Eastwood*, 19 Wend. 514. *Bank of Alexandria* v. *Patton*, 1 Rob. (Virg.) 499. It is, however, otherwise settled in this State. *Ricker* v. *Ham*, 14 Mass. 137. *Clapp* v. *Leatherbee*, 18 Pick. 131.

But no evidence was offered, at the trial, of a design or purpose in Simeon Warren, by the first deed, to deceive or defraud his son, the subsequent purchaser for valuable consideration; and no question or suggestion of objection to the ruling, on this ground, was made at the argument. We are to take the instruction therefore, not as an abstract proposition, but as a practical rule applied to the facts and posture of the case.

The question arises upon the construction of the St. of 27 Eliz. *c.* 4, § 2, which provides "that all and every conveyance, grant, charge, &c. in or out of, any lands, &c. had or made at any time heretofore since the beginning of the Queen's Majesty's reign that now is, or at any time hereafter to be had or made, for the intent and of purpose to defraud and deceive such person or persons, &c. as have purchased or shall afterwards purchase in fee simple, &c. the same lands, &c. shall be deemed and taken, only as against that person and persons, &c. and their heirs, &c. and against all and every person lawfully having or claiming by, from or under them, which have purchased or shall hereafter so purchase for money or other good consideration, the same lands, &c. to be utterly void, frustrate, and of none effect; any pretence, color, feigned consideration, or expressing of any use or uses to the contrary notwithstanding." This Statute is said to be in affirmance of the common law. *Cadogan* v. *Kennett*, Cowp. 434. *Hamilton* v. *Russell*, 1 Cranch, 316. 4 Kent Com. (6th ed.) 463. No question is made but that the Statute is in force and has been practised upon here. In the adoption of an English Statute, the received con-

struction of that Statute to the time of our separation from the mother country is adopted with, and forms, indeed, an integral part of it. *Cathcart* v. *Robinson*, 5 Pet. 280.

But, at the time of our separation from England, there was no settled construction of this Statute. Certainly what may now be deemed the settled construction of the English courts was not then established. As late as 1777, Lord Mansfield said: "There is no part of the Act of Parliament, which affects voluntary settlements *eo nomine*, unless they are fraudulent." *Doe* v. *Routledge*, Cowp. 708. In earlier cases we find the same view of the Statute expressed, by Lord Hale in *Sir Ralph Bovy's Case*, Vent. 193; by Lord C. J. Wilmot in *Roe* v. *Mitton*, 2 Wils. 356; and by Lord Hardwicke in the case of *Newstead* v. *Searle*, cited by Lord Mansfield in *Doe* v. *Routledge*, Cowp. 708, 709. We may refer, also, to *Jenkins* v. *Keymis*, 1 Lev. 150; *Lavender* v. *Blakstone*, 2 Lev. 146; *Garth* v. *Mois*, 1 Keb. 486; *Jones* v. *Marsh*, Cas. temp. Talb. 64; *White* v. *Sansom*, 3 Atk. 412. The construction now adopted in England cannot be said to have been settled before the year 1807, in the leading case of *Doe* v. *Manning*, 9 East, 59. The rule, as now settled, is that voluntary conveyances are in all cases void as against subsequent *bona fide* purchasers for a valuable consideration. *Doe* v. *Manning*, 9 East, 59. 4 Cruise Dig. tit. 32, c. 28, § 21. *Doe* v. *Rusham*, 17 Ad. & El. N. R. 723.

As authority, the English construction does not conclude us. Still less does the reasoning upon which it is based. The ground is that the subsequent conveyance for a valuable consideration of itself proves the fraudulent intent in making the voluntary conveyance, or, in other words, that from the second conveyance the law conclusively presumes fraud in the first. It is to be observed that the St. of 27 Eliz. c. 4, has said nothing in relation to voluntary conveyances. It seeks to frustrate and render void conveyances, not because they are voluntary, but because made with the intent and purpose to deceive and defraud such person or persons as shall purchase the land for money or other good consideration. They are void, not because they are voluntary, but because they are fraudulent. This is made clear by a consideration we have not found adverted to in the cases — that the Statute applies in terms to conveyances made before its passage from the commencement of the reign. The language of the preamble is also explicit on this point. The evil was that "not only the Queen's most excellent Majesty, but also divers of her Highness's good and loving subjects, may have, incur and receive great loss and prejudice, by reason of fraudulent and covinous conveyances," &c. "meant and intended by the parties that so make the same, to be fraudulent and covinous, of purpose and intent to deceive such as have purchased or shall purchase the same." "For the remedy of which inconveniences, and for the avoiding of such fraudulent, feigned and covinous conveyances, &c. and for the maintenance of upright and just dealing in the purchasing of lands, &c. be it enacted," &c. The purpose and intent of the Act

are also quite apparent from the third section, which subjects any one, attempting to defend them, to forfeiture and imprisonment; a provision that could not be intended to apply to voluntary gifts made in good faith, by one unembarrassed in his affairs, from a sense of duty or affection.

The effect of the construction given to the Statute under the English rule is this: If a man makes a voluntary conveyance from love, affection or sense of moral duty, and afterwards conveys the same estate to a third person for a valuable consideration, the mere making of the second deed shall be conclusive evidence of a fraudulent intent in making the first, no matter what the interval of time by which they are separated. The more natural conclusion would seem to be that the intent lies near the act, and that the purpose of the second conveyance was to deprive the grantee of the rights acquired under the first; and, where the second grantee had knowledge of the first conveyance, that he colluded with the grantor in effecting that purpose.

There are several objections to this construction, equally fatal. The first is, that it conclusively determines, as a question of law, what is a mixed question of law and fact. A man has a right to give away his estate. Such gift is good as against him and his heirs or devisees. It is void only as against creditors, or under that Statute as against subsequent purchasers for a valuable consideration. It is void against them, only when it was made with intent and purpose to deceive and defraud them. Whether such intent and purpose existed would seem to be a question of fact for the jury; but if it be a question of law, that is, if it be the legal inference from the facts proved, the inference cannot be made till the facts are found.

But this construction makes its inference or presumption of fraud from the mere fact of a subsequent conveyance for valuable consideration; so that, in effect, all voluntary gifts are made void as against subsequent purchasers, however reasonable and just may have been the purposes of the first conveyance, or however unreasonable and unjust the purposes of the second. It shuts the door to the inquiry whether, in fact, the conveyance, grant or charge, sought to be avoided, was made with the intent and purpose to deceive and defraud, for which reason alone the Statute seeks to avoid them.

Again; it not only makes the inference or presumption of fraud from the simple act of subsequent sale; but it makes that presumption retrospective, and conclusive of the character of a previous act, however long the interval of time between the two, or however changed the condition, relations and motives of the actors. It says, because the grantor has now sold for a valuable consideration, the intent and purpose to sell for a valuable consideration must have existed in his mind some fifteen or twenty years ago, it may be, when he made the voluntary gift. The Statute draws no such conclusion. The common law, in whose light it is to be construed, draws no such conclusion. Such conclusion is not based upon any law of the human mind, or any experi-

ence of the modes of its operation. The most that can justly be said is, that the second conveyance has created a party capable of avoiding the first, if it was fraudulent; and that by reflection it has some tendency to show the purpose and intent of the first, greater or less as the transactions are near or distant in point of time, or are connected in fact by the other evidence in the case.

Another objection to this view of the Statute is that it leaves uncertain the tenure of property. The owner of real estate has the legal right to make a voluntary gift of it; and if the gift be made in good faith, it will conclude him and his heirs, and ought to conclude all other persons. The question whether it was made in good faith, depends upon the situation of his affairs when it was made, and the motives and purposes which led to the act. The grantor is wealthy, owes no man, gives to a child whose infirmity requires his aid a reasonable allowance out of his estate; he conveys to him a dwelling-house or farm; the inducement to the act was a sense of duty, with no ulterior purpose; the deed is duly registered; the party enters into open possession. Such a gift would seem to be as remote as possible from fraud; but, under this rule of construction, the question whether valid or not is made to depend upon the fact whether the grantor shall at any time thereafter convey such estate for a valuable consideration. If so, the rule presumes conclusively that the gift to the child was fraudulent; and it is avoided by the subsequent grantee, even if he had full knowledge of the first conveyance. Because, says Lord Ellenborough in *Doe* v. *James*, 16 East, 212, "it amounts only to notice of a settlement which was void against a subsequent purchaser for a valuable consideration;" that is, it is a conveyance that was fraudulent. Surely, such a construction makes the Statute an instrument of fraud, rather than a means of prevention.

In a recent case in the Queen's Bench, Lord Campbell thus states the doctrine: "The principle on which voluntary conveyances have been held uniformly to be fraudulent and void as against subsequent purchasers appears to be, that, by selling the property for a valuable consideration, the seller so entirely repudiates the former voluntary conveyance, as that it shall be taken conclusively, against him and the person to whom he conveyed, that such intention existed when he made the conveyance, and that it was made in order to defeat the purchaser." *Doe* v. *Rusham*, 17 Ad. & El. N. R. 724, 725. It is to be observed that Lord Ellenborough, in *Doe* v. *Manning*, seems to have decided upon the preponderance, and not the uniformity, of the authorities. Lord Campbell's statement of the doctrine, we cannot but think, puts it on ground less tenable, if possible, than that before examined. The grantor, under the Statute of 27 Eliz. has, strictly, no power to repudiate a voluntary conveyance. As against him and his heirs or devisees, and those claiming under their deed, the voluntary conveyance is valid. He gives to another a power to do what he cannot do himself. The second grantee holds as against the first, not because the grantor

has repudiated his first conveyance, but because it was originally fraudulent. The second conveyance did not make the first fraudulent, but it enabled the new grantee to avoid it, because it was made with intent and purpose to defraud subsequent purchasers. And if there were this power of repudiation, it is not easy to see how the act of to-day conclusively shows a fraudulent purpose and intent in an act twenty years ago, and this not only as against the grantor, but as against the first grantee.

For these, among other reasons, we cannot accept the construction of the Statute now settled in England; we are not concluded by its authority; we are not convinced of its soundness.

The true construction of the Statute we think is, that conveyances are not avoided merely because they are voluntary, but because they are fraudulent; that a voluntary gift of real estate is valid as against subsequent purchasers and all other persons, unless it was fraudulent at the time of its execution; that a subsequent conveyance for a valuable consideration is evidence, but by no means conclusive evidence, of fraud in the first voluntary conveyance; and that a voluntary gift, made when the grantor is not indebted, in good faith and without intent to defraud future creditors or subsequent purchasers, is good as against a subsequent purchaser for valuable consideration with notice. Such we understand to be the construction practically adopted in this commonwealth, and which is, to use the words of Chancellor Kent, "the better American doctrine." 4 Kent Com. (6th ed.) 463, *note*. *Bennett* v. *Bedford Bank*, 11 Mass. 421. *Ricker* v. *Ham*, 14 Mass. 137. *Salmon* v. *Bennett*, 1 Conn. 525. *Cathcart* v. *Robinson*, 5 Pet. 280. *Jackson* v. *Town*, 4 Cow. 603. 1 Story on Eq. § 427 *et seq.* 1 Cruise Dig. (Greenl. ed.) tit. 7, c. 2, § 7, *note*. 1 Amer. Lead. Cas. (3d ed.) 78.

The result is, that the instructions of the judge on this point were right, and that the exceptions to these instructions are overruled.[1]

[1] A second point, on the effect of Mrs. Quindley's deed to the plaintiff, is omitted. The deed was held to pass her interest to him.

But see *Fleming* v. *Townsend*, 6 Ga. 103 (1849).

SECTION III.

PURCHASER FOR VALUE.

PRODGERS *v.* LANGHAM.

KING'S BENCH. 1663.

[*Reported* 1 *Sid.* 133.]

BAUDE, seised in fee of several lands and manors in the County of Northampton, and being a recusant and also a soldier in the war for King Charles I., in the year 1643, let his manors to A. and B. in trust for his only daughter and heir (now the wife of the plaintiff), for twenty-one years, to the intent that the profits before marriage should be for her for her maintenance, and to raise a portion, and if she should marry Poulton or some one else in the lifetime of the said Baude, with his consent and liking, then in trust for her during the residue of the term. The said daughter did not marry P., but she married the plaintiff, with which Baude was displeased; but after a time he was satisfied with it and lived with them, and afterwards died.

And it was held by the court in this case, —

1. That the conveyance to the daughter before marriage was a voluntary conveyance, and will be void by the Statute of Fraudulent Conveyances, as to purchasers for valuable consideration, as L. was in this case.

2. That although it was void in its creation as to purchasers, yet when the marriage took effect, the first settlement did not remain voluntary as it was at its creation, but is on valuable consideration and not to be avoided, inasmuch as the marriage is an advancement of the daughter, and he who married her was induced so to do by reason of this provision.

So it was agreed PER CURIAM that although a deed be fraudulent in its creation and voidable by a purchaser, yet it can be made good by matter *ex post facto*, as if one makes a feoffment covinously, which feoffee makes a feoffment for valuable consideration, and then the first feoffor enters, and makes a feoffment for valuable consideration, the feoffee of the first feoffee will keep the land and not the feoffee of the first feoffor, for although the estate of the first feoffee was in its creation covinous and so voidable, yet when he enfeoffs one for valuable consideration, that one will be preferred before the later one, and so it was adjudged lately on argument in this court.

3. That Baude could agree to the marriage at any time during his life, and therefore inasmuch as he agreed afterwards, although he disagreed at first, *semble* that it is good. And although they proved that

he once disagreed expressly, yet it was held that he could agree afterwards; *quære tamen* if the agreement relates for this purpose, because by the disagreement the estate was devested.

4. That although the lease for twenty-one years were concealed eighteen of the years, that would not make it to be fraudulent by reason of the concealment, if the revealing of it would have led to its being vacated, as might have happened in this case, because, the deed being after 1642, the committees[1] avoided and annulled all such deeds or imprisoned the party until he would do it. Therefore although the deed was not revealed until all but two years of the term were expired, yet it remained good against Langham the purchaser, and so was found.

JENKINS *v.* KEYMES.

CHANCERY. 1688.

[*Reported* 1 *Lev.* 237.]

SIR NICHOLAS KEYMES being tenant for life, the remainder to his son, Sir Charles, in tail; they about the year 1641, in consideration of a marriage to be had between Sir Charles and Blanch Mansel, and £2,500 portion paid, levied a fine to the use of Sir Nicholas for life, the remainder to Sir Charles and Blanch for their lives, the remainder to the heirs of the body of Sir Nicholas (Sir Charles) of the said Blanch begotten, the remainder to the heirs of the body of Sir Charles, with power for Sir Nicholas to charge the premises with £2,000. Sir Nicholas and Sir Charles about the year 1842, joined in a lease and release to David Jenkins, the Welsh judge, and his heirs, for £2,000, on condition of payment of £2,000, with interest some years after, to be void, and covenants, on default of payment, to make further assurance. And about the year 1643, by indenture between Sir Nicholas of one part, and Sir John Awbry of the other part, Sir Nicholas reciting the power, it is said, in the indenture, that he charged the premises with £2,000 for the payment of his debts; but it is not said, that he granted anything to Sir John Awbry, nor that he charged the lands to Sir John Awbry, or to any other person, but (only) that he charged them. Blanch afterwards dies without issue, Sir Charles marries another wife, by whom he had issue Sir Charles the defendant, and dies: David Jenkins dies, and leaves David Jenkins the plaintiff, his heir and executor, who brought an ejectment in the Exchequer Chamber; and on a special verdict it was adjudged, as before appears, that the lease and release was no good execution of the power at common law; and now he brought his bill in equity on these grounds, viz., 1st. That the consideration of the marriage of Blanch, and the £2,500 paid with her

[1] See St. 1642, *c.* 4, Scobell's Acts, p. 37.

did not extend to the defendant, being an issue by the second venter, and so the estate in remainder, whereby he claimed, was voluntary. 2dly. That the father, tenant in tail, joining in the conveyance (who might by fine have barred the defendant) if his issue could not be obliged by his covenant for further assurance, to make that assurance good which his father had made. 3dly. If not, then though the power be not well executed as to the intent, yet whether it shall not be made good in equity as to the £2,000. And upon the bill and answer with this further, that Sir John Awbry having £500 due to him, and suing here for relief, his bill was dismissed, Sir Nicholas only having sealed the deed, and no proof that Sir Charles assented thereto, which was now made appear (Q.) ; and it also appeared that the defendant had paid other debts of Sir Nicholas due by bond to the value of £2,000. And now on the said points it was declared by the Lord Keeper Bridgman as to the first, the consideration of £2,500 paid on the first marriage, should extend to the issue by the second venter ; and as to the *second*, that the issue in tail was not bound by the covenant of his father to make that assurance good, which his father might have made good by a fine, although it was said, that it had been so done formerly, and that the Lord Chancellor Hyde was of that opinion : and as to the *third*, the Lord Keeper held, that Sir Nicholas and Sir Charles joining in the conveyance to Jenkins, and covenanting on default of payment to make further assurance, cannot be taken to be an execution of the power at all, but as a common mortgage ; and although that the deed to Awbry was not a legal execution of the power, for default of a person to whom it should be charged, yet it being intended for an execution of the power, it shall be aided in equity before that to Jenkins, and that the defendants having (though not executors), paid to the value of £2,000 in debts, may apply it in execution of the power to the discharge of the lands, being ter-tenants.

NEWSTEAD *v.* SEARLES.

Chancery. 1738.

[*Reported* 1 *Atk.* 265.]

The plaintiff Newstead is the eldest son and heir of Elizabeth, late the wife of Newstead senior, who was the eldest daughter and coheir of Elizabeth Searles deceased, by John Martyn, her former husband, and the plaintiff Susannah is the youngest daughter, and another of the coheirs of Elizabeth Searles, deceased, by John Martyn, and the plaintiff Elizabeth the wife of Joseph Atkinson, is the daughter of Susannah Stokes, and grandchild of Elizabeth Searles.

Mr. Cornwallis seised in fee of freehold and copyhold, and pos-

sessed of leasehold, held of the Bishop of Norwich in Suffolk, of the yearly value of £150, made his will in 1698, having first surrendered his copyhold estate to the use of his will, and thereby gave to Grace his wife all his freehold, copyhold, and leasehold, for so long as she should continue his widow, and after her decease, then he gave the freehold, copyhold and leasehold estates, to Elizabeth Searles, then Elizabeth Martyn his daughter, and her heirs; the testator died soon after.

Elizabeth Searles, before her marriage with the defendant Samuel Searles, by indenture dated the 30th of April, 1709, between her of the first part, Samuel Searles of the second part, Smith and Maltyward of the third part, reciting the will of Mr. Cornwallis, and that a marriage was intended between Elizabeth and Samuel; and that it was agreed Elizabeth should have the disposition of her estates after the death of Grace; Elizabeth with the consent of Samuel for the settlement of her estate upon such children, and grandchildren, as Elizabeth should have living, either by her late husband John Martyn, or by Samuel Searles at the time of her death, did covenant with Smith and Maltyward, that they and their heirs should after the intended marriage, and the death of Grace, stand seised of the messuage held by lease of the Bishop of Norwich, and all other the said estates of John Cornwallis, given by his will to Elizabeth Searles after Grace's decease, to the uses therein and after mentioned, that is to say, when the freehold and copyhold lands should come to be vested in Elizabeth, to permit Samuel Searles to receive to his own use, during the coverture, the rents and profits thereof, and if Elizabeth survived Samuel, then she to receive them during her life, with a power to Elizabeth to charge the said estates by her will, or any other writing, with £200 to be paid after her decease, as she should appoint, and for want of such appointment, to be paid to Samuel, and after the deaths of Grace and Elizabeth, that the trustees and their heirs "should divide the freehold, copyhold, and leasehold estates in manner following, (that is to say,) if no issue between Samuel and Elizabeth living at her decease, that then they should convey one moiety of the said premises to the use of the plaintiff Newstead, his heirs and assigns, and the other moiety to the use of the plaintiff Susannah Stokes her daughter for life, remainder to her granddaughter the plaintiff Elizabeth Atkinson, her heirs and assigns; provided, if there should be any child or children between Samuel and Elizabeth, that then each such child to have an equal share of the said estate, with the plaintiff Newstead and Elizabeth Atkinson."

The marriage took effect, and the defendant Searles entered upon the freehold, copyhold, and leasehold lands, and received the rents thereof, upon the death of Grace, which happened in 1719, and enjoyed the same unto the death of Elizabeth, which happened in September 1733, without leaving any issue by the defendant Searles; the plaintiff, on the death of Elizabeth, became entitled to the said moiety under

the settlement, and Susannah Stokes to the other for life, with remainder to Elizabeth Atkinson and her heirs, and insist the same ought to be conveyed accordingly, and that the deed of the 30th of April, 1709, ought to be carried into execution; and therefore by their bill pray an account of the rents, &c. received from the freehold, copyhold, and leasehold estates, since the death of Elizabeth Searles, and that one moiety of the residue of the profits may be paid to the plaintiff Newstead, the other to the plaintiff Stokes, and Susannah his wife, and that the legal estate of the said freehold, copyhold, and leasehold estates may be granted, surrendered, and conveyed to such of the plaintiffs as are entitled to the same, according to the settlement of the 30th of April, 1709.

The defendant Searles in 1719, together with Elizabeth his wife, mortgaged the freehold estate for a term of years, for £200 to Pindar, and the leasehold estate was afterwards assigned to him, as a further security, and Searles and his wife levied at that time, and afterwards, fines, whereby the freehold and leasehold became vested in Searles in fee, after Elizabeth's death, subject to the mortgage.

Searles insisted that he was entitled to the equity of redemption, and that his wife executed such deeds and fines out of affection to him, and also that Elizabeth dying without appointing the two hundred pounds under the deed of the 30th of April, he ought to have it paid to him.

The defendant Miller claims as assignee of Pindar's mortgage term, which after several mesne assignments became vested in him the 26th of March, 1733, at which time he advanced a further sum to Searles and his wife, and that there is now due to him for principal £1310 besides interest, and says that he never had any notice, till after the death of Elizabeth Searles, of the plaintiff's claim, nor of the indenture of the 30th of April, 1709.

Lord Chancellor [Hardwicke]. The question is, Whether the articles of the 30th of April, 1709, are for a valuable consideration and binding, or ought to be considered as voluntary and fraudulent, with respect to subsequent creditors or purchasers?

If I was to lay it down as a rule that such articles as these are not binding, it would become impossible for a widow on her second marriage to make any certain provision for the issue of a former, and the second husband might then contrive to defeat the provision made for those children.

I am of opinion these articles ought not to be considered as a voluntary agreement, and that the plaintiffs are entitled to relief in this court. This is the case of a widow, who has two children by a former husband, and no provision made for them, and those two children have each of them a child, and the mother being in possession in her own right of freehold estate, leasehold, and copyhold, the second husband, if there had been a child born alive, would have been entitled to be tenant by the curtesy of the freehold, and also to the leasehold and copyhold immediately upon the marriage.

To prevent this, by the articles before the second marriage, £200 is allowed to be raised by the wife out of the estate, and in case there should be no children of the second marriage, then one moiety thereof was to go to the plaintiff Newstead, his heirs and assigns, and the other to Susannah Stokes for life, remainder to Elizabeth Atkinson, her heirs and assigns, the former her grandson by the first marriage, and the latter her daughter and granddaughter; but if there should be any child or children of the second marriage, then they were to have an equal share with the plaintiffs.

Upon the mortgage to Pindar, by the contrivance of some country attorney, Elizabeth Searles and her husband levied a fine, and in the deed to lead the uses there is a complete recital of the will, under which the wife claimed, and of her marriage settlement in so ample a manner, that the will and settlement must necessarily have been laid before him, and he must consequently have had full notice of it as agent for the mortgagee.

The children of the first marriage stand in the very same plight and condition as the issue would have done, if there had been any of the second marriage, and even are provided for before them.

Supposing there had been issue of the second marriage, and they had brought their bill to carry these articles into execution, upon a decree in their favor, would not the children by the first marriage have been equally entitled to a benefit from the decree?

Taking the case with all its circumstances, I think the settlement no voluntary agreement, but a binding one; the Statutes of the 13 and 27 Eliz. that make conveyances fraudulent, are voluntary conveyances, made against purchasers upon a valuable consideration, or *bona fide* creditors: but it would be difficult to show that such a limitation, as in the present case, has been held fraudulent, and void against subsequent purchasers or creditors.

The present is a stronger case, for here are reciprocal considerations both on the part of the husband and wife, by the provision under the articles for the children of the second marriage.

The mortgagees had notice that the lands were liable to these articles, and therefore the plaintiffs are entitled to have the benefit of them against the defendants who are affected by notice; and his Lordship decreed an account to be taken of what is due for the principal sum of £200 and interest, from the death of Elizabeth, the late wife of defendant Searles, and to tax Miller his costs so far as relates to the mortgage of £200 and upon being paid what shall be reported due, ordered the defendants Miller and Searles to convey the freehold, and to assign the leasehold, and surrender the copyhold free of all incumbrances done by them, to the plaintiff Newstead, Susannah the wife of Stokes, and Elizabeth the wife of Atkinson, according to the several estates and interests therein provided and limited to them by the said marriage articles.

CLAYTON *v.* WILTON.

King's Bench. 1813.

[*Reported* 6 *M.* & *S.* 67 *n.*]

Case from the Court of Chancery. The plaintiff being seised in fee, previously to, and in contemplation of his marriage with Susan Nuttall, by indentures of lease and release of the 28th and 29th of November 1788, between the plaintiff of the first part, the said Susan Nuttall of the second part, Earl Grey de Wilton and Charles Townley of the third part, and Randall Andrews and Thomas Whitehead of the fourth part, reciting that the said S. Nuttall was possessed of and entitled to a portion or fortune, consisting of several sums of money placed out at interest upon mortgage in her own name, and in the name of the executors of her late father, during her minority, whereupon there was due for principal and interest the sum of £7,000 and upwards; reciting also the intended marriage, and that upon the treaty thereof, it had been agreed that, in case the marriage took effect, the said portion or fortune should be paid and applied towards discharging certain sums of £10,075, which were good charges in equity upon the said estates of the plaintiff; and that the said hereditaments should be settled upon such trusts, and subject to such powers, provisos, &c. as thereinafter expressed, he, the plaintiff, in consideration of the intended marriage, and of the said portion or fortune being paid and applied as before mentioned, and for making a competent jointure for the said Susan Nuttall, in case the marriage should take effect, and she should survive him, and also a provision of portions and maintenance for the issue of the marriage, and for settling and assuring the said hereditaments upon such trusts, and subject to such powers, provisos, &c. as thereinafter mentioned; and in consideration of the sum of 10*s.* by the said Lord Grey, C. Townley, R. Andrews, and T. Whitehead to the plaintiff paid, the receipt whereof was thereby acknowledged, released and conveyed the said hereditaments unto the said Lord Grey, C. Townley, R. Andrews, and T. Whitehead, and their heirs, to the use of the plaintiff and his heirs till the marriage, and afterwards to the use of him and his assigns for life, without impeachment of waste; remainder to the use of the said Lord Grey and the three other trustees in trust, to preserve contingent remainders; remainder to the said Susan Nuttall and her assigns, to receive a certain rent charge thereout for her jointure, and in bar of dower; remainder to the use of the first and other sons of the plaintiff on the body of the said Susan Nuttall to be begotten, and the heirs male of their bodies severally and successively in tail male; remainder *to the use of the first son of the plaintiff on the body of any woman or women he might happen to marry after the decease of the said Susan Nuttall, to be begotten, and*

the heirs male of the body of such first son lawfully issuing; remainder to the use of the second, third, fourth, and all and every other son and sons of the plaintiff on the body of any such woman or women, and the heirs male of his and their bodies; remainder to the use of all and every the daughters of the plaintiff on the body of the said Susan Nuttall to be begotten, equally to be divided between them as tenants in common, and of the heirs of the body and bodies of such daughter and daughters, with cross remainders to the daughters; and in case all but one should die without issue, or if there should be but one such daughter, then to the use of such one surviving or only daughter and the heirs of her body; remainder to the use of the plaintiff and his heirs forever.

The marriage took effect, and the said Susan Nuttall died without issue; after whose death the plaintiff, before he married again, by indenture of lease and release of the 17th and 18th of June 1794, conveyed a part of the said hereditaments to Lady Mary Stanley and her heirs, *for a full and valuable consideration* paid by her to the plaintiff.

And the question was, whether this conveyance was a good and valid conveyance against the issue of the plaintiff's second marriage.

This question was argued at Serjeants' Inn on Tuesday, the 27th April 1813, at the sittings before Easter Term, by *Scarlett* for the plaintiff, and *Holroyd* for the defendant; the point in debate being, whether the settlement, as it regarded the children of a future marriage, was to be deemed voluntary, and as such, void against a subsequent *bona fide* purchaser for valuable consideration. And the court afterwards sent the following certificate: —

"This case has been argued before us by counsel. We have considered it, and are of opinion that the conveyance by the plaintiff to Lady Mary Stanley is not a good and valid conveyance against the issue of the plaintiff's second marriage.

ELLENBOROUGH, S. LE BLANC,
N. GROSE, J. BAYLEY."

WARDEN *v.* JONES.

CHANCERY. 1857.

[*Reported* 2 *De G. & J.* 76.]

THIS was an appeal from the decision of the *Master of the Rolls*, setting aside a postnuptial settlement as fraudulent against the creditors of the settlor.

At the time of the settlor's marriage his intended wife was the registered proprietor of £1,000 stock of the Lancashire and Yorkshire Railway Company, and according to the Company's Act and to the

Companies Clauses Consolidation Act incorporated therewith, the stock, when held by any female proprietor, passes upon her marriage to her husband, unless a settlement or agreement for a settlement is made or entered into on the marriage, and the company does not recognize the wife after the marriage as the proprietor of the stock, the husband having immediately upon the marriage, and without notice, power to sell the stock upon the production of a copy of the marriage certificate, and a declaration verifying the same, and identifying the wife as the proprietor registered in the books of the company. The husband may in this manner sell and transfer to a purchaser, but the company does not register the transfer until the husband is recognized as proprietor by his name being registered as such.

According to the evidence on behalf of the wife, she and her intended husband went together to a solicitor a few days before the marriage to have a settlement prepared of the stock. The solicitor, however, could not prepare the settlement in time for the marriage, and the intended husband told the intended wife that the settlement would be equally good if prepared afterwards.

The stock was subject to a mortgage for £260, and the stock certificates were in the hands of the mortgagee.

The marriage took place on the 16th of June, 1855, without any settlement or agreement for a settlement having been made in writing, but on the 6th of July following a settlement was executed. It was dated on that day, and made between Charles William Henry Barnett and Elizabeth his wife (the husband and wife) of the one part, and Thomas Williamson Jones and George Sneade of the other part, and thereby, after reciting the marriage and that no settlement was executed between Charles William Henry Barnett and Elizabeth his wife previous to their said marriage, and that the said Elizabeth Barnett was at the time of her said marriage possessed of or entitled to the sum of £1,000 stock of the Lancashire and Yorkshire Railway Company, subject nevertheless and charged with the payment of £260 to Jonathan Jones therein described for money advanced by him to Elizabeth Barnett previous to her marriage, with interest thereon, and that it had been agreed between Charles William Henry Barnett and Elizabeth his wife that the said sum of £1,000 stock of the Lancashire and Yorkshire Railway Company should be forthwith sold, and that the produce thereof should be applied first in payment of the said sum of £260 and interest so due and owing to the said Jonathan Jones as aforesaid, then in the purchase of the sum of £500 £3 per cent Reduced Bank Annuities in the names of Thomas Williamson Jones and George Sneade, and settled as thereinafter mentioned, and that the residue thereof should be retained by the said Charles William Henry Barnett and Elizabeth his wife, for their own use and benefit: It was witnessed, that for the considerations therein mentioned, he Charles William Henry Barnett, for himself, his heirs, executors and administrators, and for the said Elizabeth his wife, covenanted with the said Thomas Williamson Jones and George

Sneade, and the survivor of them, and the executors and administrators of such survivor, that they the said Charles William Henry Barnett and Elizabeth his wife would forthwith sell the said sum of £1,000 stock of the Lancashire and Yorkshire Railway Company, and within one calendar month from the date of the deed invest a sufficient part of the proceeds in the purchase of £500 £3 per cent Reduced Bank Annuities in the names of Thomas Williamson Jones and George Sneade, and that the said Bank Annuities should be held by the said Thomas Williamson Jones and George Sneade upon the trusts therein declared. And it was further witnessed, that in consideration of the said marriage and for making some provision for the said Elizabeth Barnett, and for the issue (if any) of the same marriage, the said Charles William Henry Barnett and Elizabeth his wife thereby respectively directed and appointed that the said Thomas Williamson Jones and George Sneade, their executors, administrators, and assigns, should stand and be possessed of the said Bank Annuities, and the dividends thereon, upon trust during the joint lives of the said Charles William Henry Barnett and Elizabeth his wife for the sole and separate use of the said Elizabeth Barnett, without power of anticipation; and in case the said Charles William Henry Barnett should die in the lifetime of the said Elizabeth Barnett, upon trust to assign the said Bank Annuities unto the said Elizabeth Barnett, for her own absolute use and benefit; but in case the said Elizabeth Barnett should die in the lifetime of the said Charles William Henry Barnett, upon trust to pay the dividends of the said Bank Annuities unto the said Charles William Henry Barnett for his life, and from and after his decease upon the trusts therein mentioned for the issue, if any, of the said marriage; and in case there should be no child or children of the said marriage, or none who should attain the age of twenty-one years or marry as therein mentioned, upon such trusts and for such purposes as the said Elizabeth Barnett should appoint as therein mentioned, and in default of appointment in trust for the next of kin of the said Elizabeth Barnett.

On the day of the date of the settlement the husband, with the concurrence of the wife, sold and transferred the stock, and received the purchase-money, amounting to about £880. Of this amount, £270 was applied in discharge of the principal and interest due on Mr. Jones's encumbrance, and in paying expenses. Out of the residue £500 Reduced Bank Annuities was purchased and settled on the above-mentioned trusts.

The *Master of the Rolls* held the settlement to be void against the plaintiff. The case is reported in the 23d volume of Mr. Beavan's Reports, page 487.

The wife appealed.

Mr. R. Palmer and *Mr. Sidney Smith*, for the plaintiff.

Mr. Lloyd and *Mr. Langworthy*, for the appellant.

Judgment reserved.

The Lord Chancellor. [Lord Cranworth.] This is a bill filed by a creditor of defendant Charles W. H. Barnett to set aside a post-nuptial settlement, under these circumstances.

On the 16th June, 1855, Mr. Barnett married Elizabeth Jones, and no settlement nor any written agreement for a settlement was made before the marriage.

Elizabeth Jones was entitled to £1,000 stock of the Lancashire and Yorkshire Railway Company, subject to a charge thereon of £260 to her brother Jonathan Jones.

On the 6th July, 1855, a settlement was made, whereby part of the proceeds of the stock was covenanted to be invested upon trust for the separate use of Elizabeth during the joint lives of herself and her husband, and after his decease, subject to a trust for the children of the marriage, for her absolutely. The stock was sold, and a portion of the proceeds invested according to the covenant in the settlement.

On the 12th May, 1856, the plaintiff recovered judgment for £319 19*s.* 11*d.* against Mr. Barnett, and the question is as to the validity of the settlement as against the plaintiff and Mr. Barnett's other creditors.

The Statute of Frauds provides, that "no action shall be brought whereby to charge any person upon any consideration of marriage unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith."

Here there was no such agreement, and therefore this settlement was voluntary, and if voluntary, then according to the authorities it is void against creditors under the 13th Eliz. *c.* 5. On behalf of the wife an attempt has been made to support the settlement on the ground of a parol promise made before the marriage, and for the purpose of the argument I will assume a parol promise to be proved, if that were a question respecting which I could enter upon an inquiry. The law has, however, wisely forbidden this. Persons are so likely to be led into such promises inconsiderately, that the law has wisely required them to be manifested by writing; and it is the duty of this court to act in conformity with the Statute, and not to endeavor to escape from its generally very salutary enactments in consequence of its operating harshly in a particular case.

The argument here was, first, that the parol agreement being proved, the parties were under a moral, though not legal, obligation to perform it, so that the settlement could not be fraudulent. To this, however, the judgment of Lord Northington, in *Spurgeon* v. *Collier*, 1 Eden, 61, affords a conclusive answer, — "If such a parol agreement were to be allowed to give effect to a subsequent settlement, it would be the most dangerous breach of the Statute and a violent blow to credit. For any man, on the marriage of a relation, might make such promise of which an execution never could be compelled against the promisor; and the moment his circumstances failed he would execute a settlement pursu-

ant to his promise and defraud all his creditors." It was next contended there was fraud because the husband told his intended wife that the settlement would be as valid after as before marriage. But there is no proof that this was said fraudulently. It was said, on the occasion of the visit to the solicitor mentioned in the affidavit. She might have consulted the solicitor, and I cannot infer that she was more ignorant of the law than her husband. Both consulted Mr. Massey.

It was hardly argued that the marriage was a part performance. That is clearly not so. Where, indeed, one of the contracting parties agrees, as the consideration for the marriage, to do something more than marry, as to settle an estate, and in consideration of that promise the other party either acting for her or him contract to make a settlement, then the settlement made by the one contracting party is a good act of part performance; *Hammersley* v. *De Biel*, 12 Cl. & Fin. 45. In this case, however, there is nothing of that sort.

Nor are we embarrassed here by the question which has sometimes arisen, namely, that the postnuptial settlement is recited to be made in pursuance of an antenuptial agreement. Lord Thurlow decided in *Dundas* v. *Dutens*, 2 Cox, 235, that such a settlement is good, and on that decision I will only remark, that if it be a correct view of the law, the whole policy of the Statute is defeated. It cannot be enough merely to say in writing, that there was a previous parol agreement. It must be proved that there was such an agreement, and to let in such proof is precisely what the Statute meant to forbid. Sir William Grant clearly thought that a written recognition after marriage of a verbal promise made before marriage would be invalid. One question in *Randall* v. *Morgan*, 12 Ves. 73, was, whether a letter, written by the father of the wife after the marriage, amounted to a promise to give a bond, or to a recognition of a previous verbal promise to do so. Sir William Grant, after observing that if it was a promise made after marriage to give a bond, then it was *nudum pactum*, goes on to say, "supposing, however, that this letter refers to some parol promise before the marriage, I doubt extremely whether that would be sufficient to entitle the court to construe this into an acknowledgment of a debt, for the promise, being in itself a nullity, producing no obligation, a written recognition after the marriage would give it no validity."

This most reasonable construction of the Statute is consistent with the decision of Lord Cottenham in *Lassence* v. *Tierney*, 1 Mac. & G. 551, and though the precise question does not arise in the case now before me, I have thought it right to advert to these authorities, in order that it may not be thought I decide the present case merely on the ground that it is distinguishable from *Dundas* v. *Dutens*.

I incline to think that, even if this settlement had contained a statement that it was made in pursuance of a previous antenuptial parol agreement, I should still have considered it, as I now consider it, void against creditors.

It was contended, that the property of which this lady was pos-

sessed at the time of her marriage could not have been taken at the suit of a creditor, and so that the Statute of Elizabeth does not apply. But this is not so. For by the 14th section of 1 & 2 Vict. *c.* 110, it was enacted, "That if any person against whom any judgment shall have been entered up in any of her Majesty's Superior Courts at Westminster shall have any Government stock, funds or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the Superior Courts, on the application of any judgment creditor, to order that such stock, funds, annuities or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favor by the judgment debtor: provided that, no proceedings shall be taken to have the benefit of such charge, until after the expiration of six calendar months from the date of such order."

The interest of this lady at her marriage was clearly an interest in stock of a public company, standing in her name, and by the marriage the legal right to the stock was by act of law vested in the husband. He by his marriage acquired a legal right to dispose of the stock as he thought fit, and though it appears by the evidence that the wife joined in making the transfer, this was not necessary to its validity. It was merely a reasonable precaution on the part of the company, as it saved the necessity of afterwards proving the marriage.

The fact of the certificates being mortgaged clearly makes no difference.

I think that there is no equity for a settlement, and that the husband was only exercising a legal right.

I think the judgment of the Master of the Rolls right, and that the appeal must be dismissed with costs.[1]

[1] See *Trowell* v. *Shenton*, 8 Ch. Div. 318 (1878); *Reade* v. *Livingston*, 3 Johns. Ch. 481 (1818).

DICKENSON *v.* WRIGHT.

EXCHEQUER AND EXCHEQUER CHAMBER. 1860, 1861.

[*Reported* 5 *H. & N.* 401, 6 *H. & N.* 849.[1]]

CHANNELL, B. The question in this case is whether a limitation contained in a marriage settlement, dated the 17th of May, 1830, to the plaintiff, William Thomas Dickenson, is void as against a subsequent mortgagee, by the Statute 27 Eliz. *c.* 4. The facts are these. A widow named Mary Dickenson was owner in fee simple of the property sought to be recovered. She had been married to a former husband, but an only child (the plaintiff) was born before the marriage. In May, 1830, she married a second time a person called Doncaster, and previous to the marriage, a settlement was executed under which the plaintiff claims. The settlement was by indenture between Mary Dickenson, widow, of the first part; William Doncaster, the proposed husband, of the second part, and trustees of the third part; and after reciting that Mary Dickenson was seised in fee of a messuage, &c., with the usual power to appoint, and that a marriage had been agreed on, and was shortly intended to be solemnized between her and the said William Doncaster, *and that upon the treaty of the said intended marriage it was agreed that the said messuage, &c., should be appointed, released and conveyed as thereinafter mentioned;* the settlement proceeded, in the usual way, to limit the property to her use, until the solemnization of the marriage, and afterwards to the use of trustees during her life upon trust for her separate use, with remainder to the use of the intended husband for his life, remainder to the use of the plaintiff (describing him as her son by her late husband begotten), his heirs and assigns forever. The marriage took place. She and her husband afterwards, in November, 1836, joined in a mortgage of the property to one Henry Johnston, under whom the defendant claims; the husband and wife are both dead, and the plaintiff has brought his action of ejectment, claiming title under the limitation to him in the marriage settlement. The defendant relied upon the Statute 27 Eliz. *c.* 4.

For a very long series of years, a construction has been put upon this Statute by the courts of law and equity, and it is much too late now to question whether the language of the Statute justifies it. We are bound by the decided cases which are found in the note to *Twyne's Case*, 1 Smith's Leading Cases, p. 1. The case of *Newstead* v. *Searles*, 1 Atk. 265, is a direct authority, that a settlement by a widow, about to marry, upon her children by a former marriage, is good against a

[1] In the Exchequer Chamber, the case is reported *sub nom. Clarke* v. *Wright*. The opinions only are printed, the facts appearing sufficiently therefrom.

subsequent mortgagee; and this case is referred to in Lord St. Leonards' book upon Vendors (vol. iii. p. 288, 10th ed.) as a valid existing authority. Lord Hardwicke says, if he were to lay it down as a rule that such articles as those in that case were not binding, it would become impossible for a widow, on her second marriage, to make any certain provision for the issue of a former marriage; that the second husband might contrive to defeat the provision made for their children; and he states, in the most distinct terms, that an agreement for such provision ought not to be considered voluntary, or prohibited by the Statute of Elizabeth. It is therefore clear that he considered that the provision for such children might be considered involved in the consideration of marriage.

In the case of *Mortimore* v. *Wright*, 6 M. & W. 482, it was decided that there is no common law liability upon a parent to provide even for a legitimate child. An illegitimate child cannot inherit, and in law is, in the same position as an adopted child; but there is no reason to suppose that the love and affection which a mother bears to a child born before marriage, is less tender than to one born after. Indeed, it is possible, that a consciousness of wrong she may suppose herself to have committed towards it may add strength to her sense of natural and moral duty. As to the propriety of a mother possessed of property and about to marry making a provision for her illegitimate child, no doubt can exist. Her doing so is in accordance with the natural feelings of mankind, and would be approved by all; her omitting to do so would be condemned as the conduct of a heartless woman devoid of natural affection towards a child peculiarly entitled to her kindness and consideration. In the settlement it is recited that it was agreed upon the treaty of the marriage that the property should be settled as therein contained. It is not stated by whom, on this agreement, it was proposed that the remainder should be limited to the plaintiff. It may have been that Doncaster, the intended husband, took a strong interest in the welfare of this child, who was then very young. It may have been that he believed in the existence of a moral obligation upon the part of his intended wife to provide for it, and that he insisted upon the provision as a condition of his marrying her. An honest and upright man under such circumstances might well have done so. For aught we know, he may have refused to marry her at all unless this provision was made, and it seems impossible for us to say conclusively, as a matter of law, that this limitation could not be involved in the consideration of the marriage: see *Kekewich* v. *Manning*, 1 De Gex, M'N. & G. 176.

A case of *Johnson* v. *Legard*, 6 M. & Sel. 60, was much pressed upon us. A limitation in a marriage settlement to the use of the brothers of the settlor was there held void as against a subsequent purchaser with notice. On the other hand, in the case of *Clayton* v. *The Earl of Wilton*, 6 M. & Sel. 67, *note*, a limitation in a marriage settlement to the children of a possible second marriage was held good under the same circumstances.

It may be difficult to see how the children of another marriage, to take place after the death of the wife of the present intended marriage, are more within the consideration of marriage than the living brothers of the husband; but the truth is that, when courts of law or equity once depart from the plain and obvious construction of an Act of Parliament, there is nothing to guide or direct them, and it is not surprising that inconsistencies are to be found in their decisions.

We have not been referred to any authority bearing directly upon the matter in question, and we cannot say that, upon the evidence at the trial, we are bound absolutely and conclusively, and as mere matter of law, to decide that the limitation in question is void against the plaintiff.

We would act upon any decided case, but we do not feel inclined to put a construction upon this Statute which its words do not authorize, beyond what the courts of law and equity have already laid down. The rule will therefore be discharged.

Rule discharged.

Macaulay, *Hayes*, and *A. Wills*, showed cause against the rule.

Mellor, *Field*, and *Brewer*, in support of the rule.

The defendant appealed to the Court of Exchequer Chamber.

Mellor (*Field* with him), for the defendant.

A. Wills, for the plaintiff.

Blackburn, J. In this case the decision of the Court of Exchequer was appealed against upon two grounds. First, that there was no evidence fit to be submitted to the jury of title on the part of Mrs. Dickenson to convey the premises in question by the settlement made on her marriage with Mr. Doncaster, dated the 17th of May, 1830. This ground of appeal was disposed of on the argument; there was ample evidence, and the decision of the Court of Exchequer on this point was clearly right.

The second ground of appeal was, that the limitation in that settlement in favor of the plaintiff was voluntary and void against the defendant, he being a purchaser for value. On this point the Court of Exchequer Chamber took time to consider.

On consideration, I have come to the conclusion that the limitations in question are not voluntary, and consequently that the decision of the Court of Exchequer ought to be affirmed.

We are bound by decided cases to hold that a settlement of real estate, if not made for a valuable consideration, is void against a subsequent purchaser, even with notice. Such a settlement is deemed voluntary, and therefore fraudulent and void, though made honestly and openly to provide for the settlor's wife and children: *Chapman* v. *Emery*, Cowp. 278, 280, or his mother and younger brothers and sisters: *Doe* v. *Manning*, 9 East, 59; for no moral consideration, however strong, is sufficient to support a settlement against a purchaser.

In the present case the plaintiff was the illegitimate son of the settlor, treated by her as if he were her legitimate son; and though, in my opinion, the moral obligation on her part to provide for him was as strong as if he had been her legitimate son, it was not stronger. The limitations, therefore, in his favor are, in my opinion, void as against the defendant, unless it can be shown that they were made for a valuable consideration.

No extraneous evidence was given for the plaintiff to show that there was any valuable consideration, not expressed on the face of the deed in which the limitations in favor of the plaintiff are contained. We must say, on the construction of that deed alone, whether the limitations are voluntary or not.

It is a settlement made on the marriage of a woman, Mary Dickenson, who was seised of real estate in fee, with William Doncaster. She had no legitimate children. If no settlement at all had been made, the husband would, on the marriage, have become seised in right of his wife; during the coverture he would have had the chance of being tenant by the curtesy if there were issue of the marriage, and the issue of the marriage, if there had been any, would have been the heirs of the wife, and would, in the ordinary course of things, have inherited the estate. But, by the settlement which the husband, William Doncaster, executes for the purpose of testifying his assent to it, the estate is settled to the separate use of Mary Dickenson for life, remainder as to one part of the premises to William Doncaster, the husband, for life, with remainder to the plaintiff in fee, and as to the residue of the property, with remainder to the plaintiff in fee, in case he should attain the age of twenty-one, but if he should die under that age, unmarried and without issue, to such use as Mary Dickenson should by her will appoint, and, in default of appointment, to her in fee.

So that, by this settlement, the intended husband takes different interests in the landed property from that which he would otherwise have taken. As to the part which is settled on him for life, he takes a greater interest than he otherwise would have taken; as to the residue, a smaller interest, inasmuch as he is not to have the chance of the tenancy by the curtesy; and he consents to a settlement by which the children of the marriage are totally deprived of the chance of the succession which they would otherwise have had. It seems to me that, though in general it may be supposed that on a marriage treaty, after the interest of the intended husband and wife, and the issue of the marriage, is provided for, the remainder of the estate is left to be disposed of as the party to whom it would revert pleases; yet, when we find the interests of the husband, wife and issue so much affected by the settlement, we must take it that it was agreed by all parties, as part of the marriage bargain, that the estate should be thus settled — that the wife agreed to marry the husband on the terms that this settlement should be thus made, varying his interest and depriving his children of what would otherwise have been theirs; and that the husband

agreed to marry the wife on the terms that this settlement should be so made. If this be so, the question comes to be, if a limitation in favor of a third person, not merely inserted in the marriage settlement, but appearing from its nature to have been made one of the terms of the marriage bargain, is to be considered voluntary, or is to be considered as made for the valuable consideration of the marriage?

In the argument the possible liability of the husband to support the illegitimate son of the woman about to be his wife was mentioned, and it was suggested that the husband might have required his intended wife to provide for her son, to prevent the possibility of his coming on the parish. I merely notice this argument to say that I attach no weight to it. I do not believe that any such consideration ever was thought of, and I think that such a consideration for the settlement would have been merely illusory.

In my opinion the case would have been the same if the plaintiff had been some distant relative of Mrs. Dickenson's first husband, or an absolute stranger in blood whom she had adopted and bred up as her child. The suggestions of Lord Justice Knight Bruce in *Kekewich* v. *Manning*, 1 De Gex, M. & G. 176, are to some extent adopted in the judgment of the court below in this case. I cannot say that they are satisfactory to my mind. *In ea quæ frequentius accidunt preveniunt jura;* and though doubtless it is possible that a high-minded bridegroom might insist on his intended wife providing, out of the estate which would otherwise have come to him and his children for her illegitimate child, yet, in the ordinary course of things, it is to be presumed that the stipulation for such a provision originated with the wife, and was assented to by the husband with more or less reluctance. But, though this is so, it does not follow that there was no consideration for the limitations. The husband got the enjoyment of some part of the wife's property, which he could not have had if the marriage had not taken place. He may have got this on cheaper terms; he may have been allowed to take a larger portion of her personal estate than he would have been permitted to take if this settlement on the plaintiff had not been made; or he may have been allowed to keep free a greater portion of his own property than he would otherwise have done; and, in consideration of these substantial benefits to himself, he may have become a party to a contract for this limitation. I do not know that in this case these matters did occur, but it seems to me that, as on every marriage settlement there are, to use the language of Lord Hardwicke, reciprocal considerations between husband and wife, we ought not to hold a limitation which is not merely included in the marriage settlement, but appears from its nature to have been really one of the terms of the marriage bargain, voluntary.

The marriage bargain is like any other mutual agreement in which there are many terms, — the promise by the one party to be bound by all the terms is a consideration for the promise of the other party to be bound by all the terms, so that none of them are without consideration;

though it would be quite possible that other matters mentioned at the same time were not made part of the terms of the bargain and were therefore without consideration. And it is forcibly observed in Dart's Vendors and Purchasers, p. 580, that in case of marriage the impossibility of restoring the consideration by replacing either party in their original *status* is a sufficient reason why full effect should be given to any arrangement that formed part of the equivalent for the change. It is true that the estate here belonged to the wife, and that it is presumably at her instance that the stipulation was inserted. But it seems to me that, when once it is shown that the intended husband and wife bargained that part of what would otherwise have been the joint fund of the matrimonial firm, should on the marriage go in a particular way, it is immaterial whether it is part of what the husband would have brought in that is so settled, leaving the wife's contribution in the firm, or part of the wife's contribution that is so settled, leaving the husband's in the firm. It is equally part of the bargain, and so not voluntary.

There are some very sensible observations in Dart's Vendors and Purchasers, pp. 578 and 579, in which I thoroughly concur, and which I adopt as part of my judgment. It is there said: "Unnecessary difficulty appears to have been thrown over the cases upon the subject by a confusion between the contract and the consideration for the contract; the common form of objection is, that collaterals are not within the consideration of the marriage. Now this expression is, it is submitted, scarcely accurate. If A. agreed with B. to pay him £10,000 in consideration of his conveying his estate to the use of A. for life, with remainders over in favor of strangers, and the money were paid, and the conveyance executed accordingly, a question might arise whether the remaindermen took beneficially or in trust for A.; but subsequent purchasers from B. could hardly contend that the limitations in the settlement, *ultra* A.'s life estate, were void, upon the ground of the remaindermen not being within the consideration of the £10,000. In the case of a marriage settlement the important question seems to be, first, whether the collaterals were within the contract; and secondly, whether, if so, there was a sufficient consideration for such a contract."

"Upon the first question, considered merely as one of principle, it is submitted that where the limitations over are in favor of collateral relations or connections not of the settlor but of the other contracting party (whether wife or husband), the settlement itself may be considered *prima facie* evidence of such other party having stipulated for their insertion. So where, on a settlement of the intended wife's estate, the limitations over are in favor of her own collateral relations in derogation from the husband's marital right by survivorship (in case of personalty) or as tenant by the curtesy (in case of realty). Where, in any case other than that last referred to, the limitations over are in favor of the collateral relations or connections of the settlor, such presumption cannot

so readily arise; but it might be proved that the other party stipulated for their insertion. If such a stipulation cannot be presumed or proved, the limitations must, it is conceived, be considered voluntary and void as against a subsequent *bona fide* purchaser."

Mr. Dart states this only as his own opinion, without asserting that it is established by the authorities; but it seems to me that, on the principle he thus states, the different decisions can be reconciled, and that they cannot be reconciled in any other way. *Johnson* v. *Legard*, 6 M. & Sel. 60, is the case mainly relied upon by the defendant. There Sir John Legard, on his marriage, in consideration of the marriage and marriage portion, settled his estate on himself for life, then to trustees to receive a rent-charge by way of jointure to his intended wife, then to trustees to raise portions for the younger sons and daughters of the marriage, remainder to the sons of the marriage in tail male, remainder to the sons of Sir John Legard by any future wife in tail male, remainder to the use of Sir John Legard's brother as tenant for life, with remainder to his sons. The Court of King's Bench, on a case sent to them, certified that none of the limitations, subsequent to those in favor of the first and other sons of Sir John Legard by any future wife, were good as against a purchaser for value. Unfortunately, according to the practice then existing, no reasons are given for this judgment. The Vice-Chancellor confirmed it, but his reasons are not reported. On appeal, the Lord Chancellor (Lord Eldon) reversed the decree on a ground not material to the present question; he stated, however, that he did not wish anything which he did to involve a doubt as existing upon his mind as to the opinion of the King's Bench. But he did not state what he considered the principle of that decision.

In *Sutton* v. *Chetwynd*, 3 Meriv. 249, Sir W. Grant, M. R., says that "the decision in *Johnson* v. *Legard* expressly negatives the proposition that *every* limitation in a settlement is protected and rendered valuable by the consideration of marriage, and to that extent (says he) I entirely concur in the opinion given. I say to that extent, because the negative of the general proposition is sufficient for the decision of the present case, and I do not wish to prejudice any other question that may be made when the certificate comes before the court."

To the extent to which Sir W. Grant thus cautiously limits his judgment the case of *Johnson* v. *Legard* certainly goes, and so far it seems to me quite consistent with the principles I have been stating, and with the judgment in the present case being in favor of the plaintiff. But there are two other decisions which, though consistent with the decision in *Johnson* v. *Legard*, thus limited, do not seem to me consistent with it, if it is to be understood as a decision adverse to these principles, and in favor of the defendant in the present case.

The first of these is *Newstead* v. *Searles*, 1 Atk. 268. There, a widow having children, and being about to marry again, made a marriage settlement under which her husband took an interest in the real estate of the wife, in some respects (as in the principal case) greater

than he would have done if there had been no settlement, and in some respects less; and the ultimate remainder was settled for the benefit of her existing issue as well as those, if any, of the contemplated marriage. Lord Hardwicke, C., held that the limitations in favor of her existing issue were good as against a purchaser. It was said in the argument before us that this decision proceeded merely on the ground of public policy; but Lord Hardwicke does not say so. He states the question to be, whether the articles of the 30th of April were for a *valuable* consideration, and binding, or ought to be considered as *voluntary*; and he concludes by what I understand as a terse compendium of what I have before endeavored to state as a reason for supporting all limitations shown not merely to be included in the marriage settlement, but to be part of the marriage contract. He says that there are reciprocal considerations both on the part of the husband and wife. It was said also in the argument that *Newstead* v. *Searles* was an anomalous case, and not approved of; but no case was cited, nor do I find any, in which it has been questioned or disapproved of.

Lord Mansfield in *Doe* v. *Routledge*, Cowp. 705, cites it as an authority. Lord Ellenborough in his elaborate judgment in *Doe* v. *Manning*, 9 East, 59, 65, in differing from Lord Mansfield, treats *Newstead* v. *Searles* with great respect, as if he thought it a weighty authority, as, no doubt, every decision of Lord Hardwicke's must be, and expressly cites it as a case where the settlement was founded on valuable consideration. The next case is *Clayton* v. *Lord Wilton*, 6 M. & Sel. 67, *n.* There the settlement was to the use of the husband, remainder to trustees to receive the wife's jointure, remainder to the sons of the marriage in tail male, remainder to the sons of the husband by any future wife in tail male, remainder to the daughters of the marriage. The Court of King's Bench, including Lord Ellenborough, C. J., and Bayley, J., who afterwards formed part of the court certifying in *Johnson* v. *Legard*, certified that a conveyance for value to a purchaser was not good against the issue of a second marriage, and Lord Eldon, as Chancellor, confirmed this. The reasons for this decision are not given, so that, as in the case of *Johnson* v. *Legard*, we cannot be sure on what principle it proceeded. It is suggested in a work of high authority (Sugden on Vendors), that it may have been because the limitations to the sons by the second marriage were necessary to support the limitations to the daughters by the first marriage; but, as there were trustees to preserve contingent remainders, this was not necessary even if the reason itself were sufficient. It is sometimes said that the decision is to be supported because the persons benefited in this case were children of the settlor, whilst in *Johnson* v. *Legard* they were collaterals. But though the consideration for a settlement in favor of a child may be better, of higher morality than the consideration for one in favor of a brother, it is in no respect more of a valuable consideration; and after the elaborate judgment in *Doe* v. *Manning*, 9 East, 59, it seems to me impossible to suppose that Lord Ellen-

borough decided *Clayton* v. *Lord Wilton* on the ground that any voluntary conveyance could be good against a purchaser for value. *Clayton* v. *Lord Wilton* may be supported and reconciled with *Johnson* v. *Legard* on the principle that, though, as Sir W. Grant says in *Sutton* v. *Chetwynd*, it is not true that *every* limitation in a settlement is protected and rendered valuable by the consideration of marriage, or even, as is said by Lord Macclesfield, C., in *Osgood* v. *Strode*, 2 P. Wms. 245, 255, "though it is to be *presumed* that the wife and her friends stipulated only for the limitations in favor of the husband, wife and issue of the marriage;" yet when, as in *Newstead* v. *Searles*, and in *Clayton* v. *Lord Wilton*, and, as I think, in the principal case, the limitations so interfere with those which would naturally be made in favor of the husband, wife and issue, as to indicate that the limitations must have been discussed, and made part of the marriage contract, part of the reciprocal considerations between the husband and wife, that presumption is rebutted, and the limitations are not voluntary.

It is, I think, impossible to suppose that Lord Eldon, Lord Ellenborough and Bayley, J., in *Johnson* v. *Legard* overruled the decision in *Clayton* v. *Lord Wilton*, to which they themselves were parties.

I cannot see, in any way, how the two cases are to be reconciled except on the principle which, as it seems to me, is involved in the judgment in *Newstead* v. *Searles*. I cannot find that this principle is impeached by any of the other cases, and, thinking it sound and bearing on the present case, I am of opinion that the judgment ought to be affirmed.

WILLES, J., said: I am also of opinion that the judgment ought to be affirmed; but, after the elaborate statement I have heard, and anticipating those which will follow, I think that I should not usefully occupy time in stating my reasons at large.

COCKBURN, C. J. I am of opinion that the decision of the Court of Exchequer in this case should be affirmed; but I am unable to concur in the reasons on which the decision of that court appears to have proceeded. The court seems to have assumed that the limitation in the settlement, made by the settlor on her marriage in favor of her illegitimate son, was not her own spontaneous and voluntary act, but was introduced into the settlement at the instance of the intended husband, who is supposed to have insisted on it as a condition of his marrying the settlor, which, if true, would bring this provision within the consideration of the marriage. I cannot concur in the assumption of fact on which this view is founded, and I am desirous of distinctly stating the ground on which my judgment rests. To me it appears that this limitation cannot, in any way, be brought within the consideration of the marriage: nevertheless, I am of opinion that it may be upheld.

If the construction of the Statute of the 27th Elizabeth had been *res integra*, there has been no judge who, in modern times, has had to apply the Statute, who would not probably have excluded from its

operation family settlements made honestly and without any intention of defrauding creditors or future purchasers. The Statute has seldom come under review without eliciting judicial observation on the forced and harsh construction put upon it by its first expounders; but its operation in avoiding, in favor of purchasers for value, whether with or without notice, conveyances in favor of relations, however honest and otherwise praiseworthy, if made without valuable consideration, is now too firmly established to admit of being questioned; and it must now be taken as definitively settled that a provision even for a man's wife and children, however sacred in a moral point of view the duty of making such a provision may be, is bad against a future purchaser, as being without consideration and voluntary.

On the other hand, it is equally well established that a settlement, made with a view to marriage, on a wife and the issue of the marriage, will undoubtedly be good against a future purchaser for value although without notice.

Why this distinction? Simply because the estates and interests created by the settlement are acquired from the settlor for a valuable consideration, namely, the marriage of the party for whose benefit, or the benefit of whose issue, the disposition of the property so made is to inure, either with the settlor, or some near relative of the settlor, in which latter case the bargain may be said to be made with the settlor just as much as if it had been made with an intended husband. In every such case it is manifest that, as to a disposition of property for the benefit of the opposite party or their issue, the consideration moves to the settlor. The disposition has been purchased by the marriage of the party by whom it may be assumed to have been stipulated for, and having been thus obtained for a valuable consideration it is good against the settlor and against any future disposition of the property which he or she may make, even to an innocent purchaser.

On the other hand, a disposition made by a settlor in favor of his or her own relatives not being the issue of the marriage, cannot, as it seems to me, be said to be made for a consideration arising from the marriage. The settlor is only exercising a right which he or she had before. No additional right or power in this respect is derived from the marriage. No doubt, such a disposition would not be made without the knowledge and acquiescence of the other contracting party, but that acquiescence adds nothing to the previously existing right of the settlor. Nor, except under very special circumstances, can it be supposed that a disposition in favor of the settlor's own relations, would be stipulated for by the opposite party. Certainly, such circumstances, as being contrary to the ordinary course of things, would require to be specially shown. In the absence of such proof, there being no consideration moving to the settlor, not only is the disposition voluntary in that sense of the word, but it also is so in the largest sense, inasmuch as it is plain that if, at any time before the settlement is actually executed, the settlor should change his mind, and desire the omission of

such part of it, this would be no breach of the antenuptial contract, and there would be no party who would have a right to insist on the provision being retained. I can come to no other conclusion, therefore, than that a limitation in a marriage settlement in favor of the relations of the settlor, other than the issue of the marriage, is not within the consideration of the marriage, and therefore, in the absence of any other consideration, must be taken to be voluntary.

The case of a father tenant for life who joins his son, the remainderman in tail, in a settlement on the marriage of the son, stands on an entirely different footing, and is open to very different considerations. There, the co-operation of the tenant for life being necessary to the resettlement of the estate, he has a right to stipulate for what terms he pleases as the price of his concurrence; among others, that of a provision for his other children and their issue, or the like. The consideration, there, is not the marriage, but the consent of the settlor to give up his existing life estate, and resettle the estate.

The limitation introduced in this case by the settlor in favor of her illegitimate son being thus in my opinion not within the consideration of the marriage as moving to the settlor, let us see whether there is anything to show that it can in any way have been stipulated for by the intended husband so as to make it part of that which he purchased by marrying the settlor. The probabilities are certainly all the other way. It is suggested that he may have insisted on a provision being made for the son, lest, the latter being left destitute, he, the husband, might have to maintain him; or that from a high-minded generosity he may have declined to profit by his wife's estate, unless a provision were made out of it for her son. But these suggestions are purely speculative, and rest on no proof of any sort; while it is infinitely more consistent with probability and the common experience of life that such a stipulation should have emanated from the settlor, to whom both duty and affection would suggest the propriety of making a provision out of her own estate for her own offspring. The suggestion as to the intended husband having insisted on the provision for the son from an apprehension of having to provide for him, is altogether answered by the fact that an estate for life is secured by the settlement to the husband, and that consequently the limitation in favor of the son could not come into operation until after the husband's death; and, therefore, could afford him no protection against the contingency suggested. Under these circumstances I can come to no other conclusion, than that in no point of view can this limitation be considered as within the consideration of the marriage upon which this settlement was made, and therefore that it must in this sense be held to be voluntary.

Nevertheless, I am of opinion that this limitation should be upheld. Upon the rule that in a marriage settlement a limitation in favor of the relatives of the settlor, other than the issue of the marriage, will be invalid, two exceptions have, it seems to me, been engrafted by very high authority. In *Newstead* v. *Searles*, 1 Atk. 265,

Lord Hardwicke held that in a marriage settlement the settlor might introduce a limitation in favor of the children of the former marriage; while, in *Clayton* v. *The Earl of Wilton*, 6 M. & Sel. 67, *n.*, Lord Ellenborough and the Court of King's Bench upheld, against a purchaser for value, a similar limitation in a marriage settlement in favor of the issue of the settlor by a future wife in default of issue of the intended marriage. These decisions have never, so far as I am aware, been impugned. The decision of Lord Hardwicke, in *Newstead* v. *Searles*, which has now stood for upwards of a century, is cited by Lord St. Leonards in a recent work as an existing authority. It is evident that Lord Hardwicke considered that a provision in a marriage settlement in favor of existing children could not be deemed fraudulent within the Statute. It may be that these decisions would not stand the test of a very strict analysis or rigorous logic; but it must be borne in mind that the rule on which this exception was engrafted was itself the result of a forced and arbitrary construction of the Statute. It is not to be wondered at, that judicial exposition stopped short of applying it when the consequence was to prevent the owner of property, on making a settlement on marriage, from making any binding provision for his existing children. We ought not, in my judgment, to overrule the cases to which I have referred. Having stood thus long unimpeached, they may have led to the introduction of similar provisions into many settlements, and we cannot tell what mischief we may occasion by overturning them, while no mischief can arise from sanctioning such limitations beyond what arises from their introduction in favor of the issue of an intended marriage.

The present case appears to me to come directly within the principle of *Newstead* v. *Searles*. It was as much the duty of the settlor, Mary Dickenson, to make provision for her illegitimate son as though he had been legitimate. It is impossible not to concur in the very appropriate remarks on this point made by Channell, B., in delivering the judgment of the Court of Exchequer. This being so, on the authority of *Newstead* v. *Searles*, which I think we ought not to overrule, I am of opinion that the decision of the Court of Exchequer should be affirmed.

Wightman, J., said: I agree with the Lord Chief Justice, and for the reasons given in the judgment he has read. Though for a considerable time I entertained very great doubt on the point, on the whole I have come to the conclusion that the judgment should be affirmed.

Williams, J. I am of opinion that the judgment of the Court of Exchequer ought to be reversed.

The authorities on the question raised in this case, viz., what shall be deemed a fraudulent conveyance under the Statute 27 Eliz., are so irreconcilable that it seems more advisable to consider and apply the principles which have been settled respecting it than to rely on the authority of any particular decisions.

It is established, after no little conflict of cases, that though the

Statute speaks only of conveyances, &c., "for the intent to *defraud* and deceive such persons as shall purchase the same lands," &c., yet (to use the words of Lord Ellenborough, in delivering the judgment of the court in *Doe* v. *Manning*, 9 East, 59), "every conveyance without valuable consideration is made void by the Statute, against a subsequent purchaser for such consideration," because, as against him, the court presumes fraud from the absence of consideration, and will not admit such presumption to be contradicted. It follows that settlements, though made on what is called *meritorious* consideration, as when made in the honest fulfilment of the moral duty of a husband or parent to provide for his wife and children, are within the Statute, and void as against a subsequent purchaser for value. Again, it has never been doubted that marriage is a valuable consideration; so that an antenuptial settlement is not rendered void by the Statute, but is good against any subsequent purchaser. There has been much difference of opinion respecting the extent to which the consideration of marriage ought to be carried in supporting the limitations of such a settlement, and cases are not wanting in which it has been laid down that every limitation in such a settlement is protected and rendered valuable by the consideration of the marriage. But subsequent decisions (as Sir W. Grant said, in *Sutton* v. *Chetwynd*, 3 Meriv. 249, 254) have negatived this general proposition, and the question left open is that which has been the subject of the argument before us, viz., what class of limitations in the settlement the consideration of marriage can properly be said to support.

Now, in order that he who claims under any limitation may be deemed, as against subsequent purchasers, to take for a valuable consideration, and not as a volunteer, it is obviously necessary that he, or some one on his behalf, should have *purchased* the limitation in question.

If he can support the limitation in his favor against a *subsequent* conveyance for valuable consideration, he must also be able to support it against a *prior* voluntary one, and avoid the latter under the Statute, in the character of a *purchaser* for value by reason of a *purchase* made by himself, — or some one else for his benefit. Thus Turner, V. C., in *Heap* v. *Tonge*, 9 Hare, 90, 104, speaking of the cases in which limitations to collaterals in marriage settlements of the husband's estate have been held void, says: "These cases proceed on the ground that the wife cannot be considered to stipulate on the part of the relations of the husband, and there is, therefore, *no one who purchases anything* for the benefit of those relations. If there be any one purchasing on behalf of collaterals, the limitations are supported."

Now, in a settlement, in contemplation of marriage, of the estate of the husband or wife, he or she, to whom the estate to be settled belongs, being the *grantor* of the estates created by the settlement, cannot, it should seem, be deemed to have thereby *purchased* any one of them; but the party to whom the estate does *not* belong may be regarded as

having purchased by the marriage all those limitations of the estate for which he or she can be proved, or fairly inferred, to have stipulated, such as the limitations in favor of themselves respectively, or their issue. And so with respect to limitations in favor of the collateral relations of the party to whom the estate does *not* belong; for it may well be presumed that such party stipulated, as part of the marriage bargain, for their insertion into the settlement, and so may be properly regarded as having purchased them on behalf of those who are to be benefited thereby. But an intended wife cannot be *inferred* to have stipulated on the part of the relations of the intended husband, nor the intended husband for the relations of the intended wife.

Applying these principles to the case before us, the circumstances of which are, that the estate belonged to the wife and the limitation under discussion was in favor of her illegitimate son; the question is whether, from the terms and nature of the settlement (for there is no external proof), it can be *inferred* that the husband stipulated for this limitation. If it was introduced at the instance of the wife, she cannot be deemed to have purchased the estate, in consideration of the marriage, on behalf of her son, because she cannot be regarded as purchasing the limitation which she carved out of her own estate.

But it has been contended that wherever the limitations of a marriage settlement diminish the ordinary interests which the party to whom the estate does not belong would have acquired by the marriage, it ought to be inferred that the limitations of the settlement were the subject of arrangement and bargain in contemplation of the marriage; and accordingly that, in the present case, it must be presumed that there was a bargain between the parties, to the effect that, if the wife predeceased the husband, he should take an interest for his life in one moiety of his wife's estate absolutely, whether there was a child of the marriage, so as to entitle him to curtesy, or not; and that the wife might limit the other moiety to her son in fee to the exclusion of the issue of the marriage. I do not at all dispute this proposition, but the existence of such a bargain does not justly lead to an inference that the husband stipulated for these limitations; on the contrary, when the ordinary rights of the husband, or of his issue by the marriage, are diminished, the natural presumption is that the wife insisted on such diminution, and he must be deemed to have been induced, by the consideration of her acceding to the marriage, to allow her to deal with her estate according to her own wishes, at the sacrifice of his. It cannot be properly asserted that such a bargain is a concession to the husband in consideration that he will marry the wife; but it is rather a concession to the wife that, if she will marry him, she shall be allowed to settle her own estate, as her wishes may guide her, in favor of the objects of her bounty: in other words, that she shall be allowed to make a voluntary settlement of it. Suppose a case of a marriage settlement where a still stronger inference arises that it must have been the result of a matrimonial bargain, as where the husband consents that the whole

estate of the wife shall go, after her death, to such persons as she shall by deed or will appoint, would not her appointees under such a settlement be volunteers? Could it be said that they are not so, because the wife must be deemed to have bargained with the husband that she should have the power to give her estate to whomsoever she liked, and to deprive, if she wished it, both himself and his issue by her of any participation in her estate?

In the present case it appears to me, on the principles above stated, that since the limitation in question was created by the wife, in favor of her illegitimate son, out of her own estate, and it has not been proved, nor can it be justly inferred, that the son himself or the husband or any one else purchased the limitation on behalf of her son, it must be deemed to have been created without any valuable consideration, and so to be fraudulent within the Statute.

But it is said that our decision ought to be governed by the authority of *Newstead* v. *Searles*, 1 Atk. 265. In that case a widow, previous to her second marriage, with the consent of her intended husband, settled her estate upon her issue by a former marriage, provided that if there should be issue of the second marriage such issue should have an equal share with the issue of the former marriage; the husband and wife afterwards mortgaged the estate to a person who had notice of the settlement. Lord Hardwicke said the question was whether the articles were for a valuable consideration and binding, or ought to be considered as voluntary and fraudulent with respect to subsequent creditors and purchasers; and if he was to lay it down as a rule that such articles were not binding, it would become impossible for a widow, on her second marriage, to make any certain provision for the issue of a former marriage, and the second husband might then contrive to defeat the provision made for those children. Taking the case with all its circumstances, he thought the settlement no voluntary agreement, but a binding one. He added, that it would be difficult to show that such a limitation had been held fraudulent and void as against subsequent purchasers or creditors.

It may be remarked, with respect to this judgment, that Lord Hardwicke does not say, expressly, that the limitation to the issue of the former marriage was upon a valuable consideration. He adverts, it is true, to the existence of reciprocal considerations, both on the part of the husband and wife, by the provision under the articles for the children of the second marriage; but this appears to me (with deference to what is said in the judgment of the court in *Doe* v. *Manning*, 9 East, 59, 64), to be at least as much for the purposes of strengthening his observation, that such a limitation had never been held, nor ought to be held, *fraudulent*, as for asserting that it was supported by a valuable consideration. And it should be further observed that in the year 1737, when this decree was made, the law had not been yet settled, as it has since been, that *every* limitation without a valuable consideration was fraudulent under the Statute as against a subsequent purchaser

for value. Six years later, in *White* v. *Sanson*, 3 Atk. 410, 412, Lord Hardwicke himself says: "I have heard it said in this court that there are reasonable voluntary settlements, which they will not interpose to disturb upon the construction of these Statutes (13 & 27 Eliz.);" and in the same judgment he had previously said: "I hardly know an instance where a voluntary conveyance has not been held fraudulent against a subsequent purchaser." And twenty years later, in *Cadogan* v. *Kennet*, Cowp. 432, 434, we find Lord Mansfield saying: "The Statute 27 Eliz. *c.* 4, does not go to voluntary conveyances merely, as being voluntary, but to such as are fraudulent." And in *Doe* v. *Routledge*, Cowp. 705, the same judge said that in the Statute there was not a word that impeached voluntary settlements merely as being voluntary, but as fraudulent and covinous.

It may likewise be observed, in order to prove how far from settled the law on this subject was at the time when *Newstead* v. *Searles* was decided, that Lord Hardwicke in that case relies on the fact that the mortgagees had notice of the marriage settlement, which, according to the doctrine since established, does not at all affect the right of the subsequent purchaser for value. And, further, that Lord Hardwicke speaks of the two Statutes of the 13 & 27 Eliz. as if the one put voluntary conveyances exactly on the same footing, as to creditors, as the other puts them as to subsequent purchasers, which is a very different view from that taken of the two Acts at the present time.

I will add that Lord St. Leonards, in his treatise on Vendors and Purchasers, does not cite the case of *Newstead* v. *Searles* while discussing the question whether the marriage consideration runs through the whole settlement, but as an authority for a previous passage in his treatise, viz., "On the ground of policy, *it seems* that a settlement by a widow previous to her second marriage, of her estate on the children of the first marriage, will not be deemed *fraudulent*." And in Cruise's Digest, vol. 4, p. 72, 3d ed., the case is stated as authorizing the proposition that "there is one case in which a conveyance founded on a *moral* consideration only has been held good against a subsequent purchaser, viz., that of a widow making a settlement on her children by her first husband previous to her marrying a second."

If either policy or moral duty were really the ground of that decision, it might become a question whether it could be properly applied to a limitation in favor of the illegitimate son of the settlor; but it is difficult to understand how policy or moral duty can be sufficient to uphold Lord Hardwicke's decision at this day, seeing that the limitation to the issue of the former marriage must still remain unsupported by any valuable consideration. It is more reasonable, I think, to say that Lord Hardwicke decided the case before the principles of law which would have guided him to a different conclusion were well understood; and that his decision, being in conflict with the doctrines which have since been firmly established, cannot now be regarded as binding; but must be classed with the numerous other cases which have been

decided on this head of law by eminent judges in earlier times, and have since been disregarded by the courts on a fuller consideration of all the authorities on the construction of the Statute.

Judgment affirmed.[1]

PRICE *v.* JENKINS.

CHANCERY DIVISION AND COURT OF APPEAL. 1876, 1877.

[*Reported* 4 *Ch. D.* 483 ; 5 *Ch. Div.* 619.]

THE action was brought by Margaret Price for specific performance of a contract, dated the 16th of November, 1874, by which Thomas Jenkins the elder agreed to sell a leasehold house called the Bruce Hotel, at Pant, near Merthyr Tydvil, to the plaintiff, for £200.

In the first instance, Thomas Jenkins the elder was the only defendant, but it appeared that his son, Thomas Jenkins the younger, claimed an interest adversely to his father, and he was accordingly, by the direction of the court, made a defendant.

Thomas Jenkins the younger was a son of the original defendant by his first marriage. The property the subject of the contract belonged to Thomas Jenkins the elder for a term of years at the time of his second marriage, which took place in May, 1864; and by a settlement dated the 17th of May, 1864, and made in contemplation of the second marriage, it was assigned to two trustees, of whom Thomas Jenkins the younger was one, in trust, after paying all outgoings, for Thomas Jenkins the elder, during his life, and after his death for his son Thomas Jenkins the younger, absolutely. The intended wife's property was also settled by the same deed upon her and her children. The settlement contained no covenant by the trustees to pay the rent or perform the covenants of the lease under which the premises were held.

The plaintiff contended that the settlement made on the second marriage of Thomas Jenkins the elder was voluntary, so far as related to his son by his former marriage, and was void against the plaintiff under the 27 Eliz. *c.* 4.

Thomas Jenkins the elder also set up a defence that the contract was void by reason of his being drunk when he signed it.

Dickinson, Q. C., and *Freeling*, for the plaintiff.

Morgan, Q. C., and *Maclean*, for the defendants.

HALL, V. C., after commenting upon the evidence on behalf of Thomas Jenkins the elder that he was drunk at the time when the contract was entered into, and the argument that the contract was, on that ground, not one that could be enforced by the plaintiff, and stating that the evidence showed that he was not drunk, and that it was clear that he entered into the contract unconditionally, and referring to an

[1] *See Roe* v. *Milton*, 2 Wils. 356 (1767)

agreement by counsel that the question on the settlement should be now decided, continued: —

It is unnecessary to determine whether, in the absence of such agreement, this is a contract of which the court would decree specific performance, leaving it an open question, to be determined hereafter in a litigation between the son and the purchaser, whether or not the settlement was effectual as against the latter; but the parties having agreed to have the question of the validity of the settlement, as against the purchaser, disposed of in this litigation, in my opinion the plaintiff would have been entitled to such a decree. It was argued that the court would not decree that to be done which involved a sanction or a recognition of that which was a fraud or attempted fraud upon the persons interested under the settlement. But such contention would not, I think, be available. Thomas Jenkins the elder having contracted to sell the residue of the whole term in the leasehold property, it was not open to him to say afterwards that he had not got it and would not give it to the purchaser, when she said she would take, and did not object to his title.

I now come to consider the validity of the settlement, as against the purchaser. The case of *Clarke* v. *Wright*, 6 H. & N. 849, has been relied upon by the defendant the son. That is a case which I should only follow in a similar one — I do not mean a case in which the settlement was of the same description of property, and the limitations and terms of it were framed in precisely the same way, but a case to which the principles, to be collected from the judgment in that case, and, as I consider, laid down by the Court of Exchequer Chamber, were properly applicable. But I must observe that it is very difficult to apply the principles of decision of that case to any other case not exactly similar in its circumstances; by reason of the grounds of the decision being different in the Court of Exchequer, where the case was first determined by four judges, from those of the Court of Appeal, and the grounds of the decision in that court not only differing, but differing as regards the judges who agreed with the decision of the Court of Exchequer.

The authorities which have been referred to may, I think, for the present purpose, be considered as commencing with the case of *Newstead* v. *Searles*, as reported by Mr. West, pages 287, 292. I refer to that report because facts are there stated from Lord Hardwicke's own notes and the Registrar's book which are not to be found in Mr. Atkyns' report. The argument of the Attorney-General for the plaintiffs, the children of a first marriage, was, to a great extent, founded on this — that they were the primary objects of the articles, and were to be preferred, or at least to take equally with, the children of the second marriage. Lord Hardwicke in his judgment referred to the position of a widow about to contract a second marriage, stating that unless the articles were binding it would become impossible for a widow on her second marriage to make any certain provision for issue of a former marriage, and the second husband might then contrive to defeat the

provision made for those children. In the latter part of the judgment, after going through the case, he said: "Taking the case with all its circumstances, I think the settlement no voluntary agreement, but a binding one; the Statute of the 13th and 14th of Elizabeth that makes conveyances fraudulent, are voluntary conveyances, made against purchasers for valuable consideration or *bona fide* creditors; but it would be difficult to show that such a limitation as the present case has been held fraudulent, and void against subsequent purchasers or creditors." He then referred to the case of *Jenkins* v. *Keymis*, 1 Lev. 150, stated in the note of the judgment in West's report, and also in Atkyns, and said: "The present is a stronger case, for here are reciprocal considerations both on the part of the husband and the wife by the provision under the articles for the children of the second marriage."

It may be useful to refer to *Jenkins* v. *Keymis*. It was a case of this kind: Sir Nicholas Keymis was tenant for life, and his son Charles was tenant in tail. Then, "in consideration of a marriage to be had between his son and Blanch Mansell and £2500 portion, he levied a fine to the use of Sir Nicholas Keymis for life, remainder to Charles and Blanch for their lives, remainder to the heirs of the body of Charles of Blanch begotten, remainder to the heirs of the body of Charles, with power to Sir Nicholas Keymis to charge the premises with £2500." So that Charles acquired by that settlement limitations in favor of his issue, not only of the intended marriage, but generally in favor of the issue of any marriage. The £2500, which was to be the daughter-in-law's fortune, was in consideration of a marriage to be had between Sir Nicholas's son and Blanch; but it does not appear whether the portion was paid to the son, or whether it was paid to the son and the father, or to the father alone. I am not at all sure that it did not go to the father alone; but, at all events, the lady's fortune of £2500 was paid on the occasion of the marriage. The son was party to the arrangement with the father, and that money being paid, there were limitations made in favor of the children of the son not confined to the issue of that particular marriage. Then a mortgage was made by Sir Nicholas and Charles; and the question was, whether or not that was valid, or whether it defeated the limitations to the issue of the second marriage. It was alleged that "the consideration of the marriage of Blanch and the £2500 paid with her did not extend to the defendant, being issue by the second *venter*, and so the estate in remainder whereby he claimed was voluntary." That was the ground of the contention, but Lord Keeper Bridgman "declared that the consideration of £2500 paid on the first marriage should extend to the issue by the second *venter*." It really amounted to this: that it does not appear how the money was paid, or to whom it was paid, but the money was paid, and that was the consideration for the settlement being made in that form, viz., in consideration of £2500 coming from the lady, a settlement was made which included the children of the son by a second marriage. There was, therefore, a money consideration which could not be severed and

separated. That consideration ran through the whole of the settlement and the whole of the limitations. Under those circumstances the case is one of that class in which we find a consideration paid for the particular settlement, and we cannot defeat the settlement and say it applied only to the one set of limitations down to and including merely the issue of that marriage, but it embraced the whole. It was a case of bargain between the father and son. The father had to concur in the re-settlement with his son; and the son, no doubt, may be taken to have stipulated with his father in concurring in re-settling the estate and barring the entail by the fine for a re-settlement embracing issue of any marriage. They probably changed, in some respects, the course of settlement which existed previously. It does not appear, however, what the exact ulterior limitations were; but, probably, they cut off some remainders. It was a matter of contract between father and son for that particular settlement, as well as a contract arising from, and supported by, the consideration of the portion coming from the wife. It is important to refer to that, because that case was the groundwork of Lord Hardwicke's decision in *Newstead* v. *Searles*, West's Rep. 287, who said that that was a stronger case because of the reciprocal considerations both on the part of the husband and wife by the provision under the articles for the children of the second marriage. Those reciprocal considerations were these: that the particular property which was dealt with in that litigation was settled by one limitation in favor of the issue of the two marriages. That being so, it came within the class of cases in which limitations in favor of strangers are mixed up with limitations in favor of persons who are not strangers; so that they are all to take together, or in a certain order of limitation, and such taking necessitates the court holding to be valid the limitations in favor of those who are not within the consideration. The court in such cases holds the whole to be effectual in order that it may give effect to that which, being within the consideration, must have effect given to it.

The case of *Newstead* v. *Searles* is really no authority for the general proposition that a settlement made on the occasion of a second marriage in favor of issue of a former marriage is an exception to the ordinary rule that limitations in favor of strangers or persons not within the consideration of marriage are, under the Statute of Elizabeth, defeated by alienation for valuable consideration.

Clayton v. *Earl of Winton*, 3 Madd. 302, *n.*, which is stated in a note in the first volume of Sugden's Vendors and Purchasers, page 716, was relied on. In that case it was necessary to support the limitations in favor of those not within the marriage consideration, in order that the limitations in favor of those who were within the marriage consideration might take effect.

The case of *Ithell* v. *Beane*, 1 Ves. Sen. 215, also before Lord Hardwicke, was cited by Mr. Maclean. In that case there are some observations of the Lord Chancellor which were said to have a general bearing upon the present case. He said at the close of his judgment:

"This is different from the case of a bond by a father, for it is a contract between the husband and the second wife and her friends, and so far like *Osgood* v. *Strode*, 2 P. Wms. 245, it being provided in the agreement that the son by the former wife should come in for a share, which is a bargain and for valuable consideration, for had it not been for this provision the husband would not agree to let it go so far as £400." The view that was taken in that case was that it was a bargain. Then he said: "This often happens on the marriage of a widow who contracts on a second marriage to make a provision out of her own estate after her death and the death of her second husband, for her children by a former; which may be said to be voluntary, yet is reasonable, prudent, and natural, several of which have been supported in this court as provisions for the children by the first marriage for valuable consideration. If the husband in such cases dies in life of the wife, who dies indebted, the court would not suffer her creditors to come against the children of the first marriage, for whom she had made this provision, because it was voluntary." There the case supposed is that of a widow about to marry stipulating with her intended husband that, in favor of the children of her former marriage, some portion of her property should be settled in a particular way. If there were such a bargain, I can understand, and do not dispute that it must have effect given to it, the question in these cases being, was there a bargain, according to the true construction of the particular instrument, that the property should be settled? In that case the observations are only applicable to the property of the wife herself, that she stipulated that some portion of her property which would otherwise come under the control of the husband, and in which he might have an interest of his own or some portion of it, should be settled in a particular way. The observations have no application whatever to the case of the other party to the contract making a settlement of his own property, and it not being a settlement made of the property of the wife. That brings me to the case before the Court of Exchequer, and afterwards before the Court of Exchequer Chamber, of *Dickenson* v. *Wright*, 5 H. & N. 401, and *Clarke* v. *Wright*, 6 Ibid. 849. In the Court of Exchequer the judgment was delivered by Baron Channell. The view he took of it was this: First, he referred to the recital, "that it was agreed upon the treaty of the marriage that the property should be settled as therein contained. It is not stated by whom: on this agreement, it was proposed that the remainder should be limited to the plaintiff. It may have been that Doncaster, the intended husband, took a strong interest in the welfare of this child, who was then very young. It may have been that he believed in the existence of a moral obligation upon the part of his intended wife to provide for it, and that he insisted upon the provision as a condition of his marrying her. An honest and upright man, under such circumstances, might well have done so. For aught we know he may have refused to marry her at all unless this provision was made, and it seems impossible for us to say conclusively, as

a matter of law, that this limitation could not be involved in the consideration of the marriage: see *Kekewich* v. *Manning*, 1 D. M. & G. 176. A case of *Johnson* v. *Legard*, 3 Madd. 283, was much pressed upon us." Then he referred to that which is the common and ordinary case of a limitation in favor of third parties, and said: "On the other hand, in the case of *Clayton* v. *Earl of Winton*, 3 Madd. 302, *n.*, a limitation in a marriage settlement to the children of a possible second marriage was held good under the same circumstances. It may be difficult to see how the children of another marriage, to take place after the death of the wife of the present intended marriage, are more within the consideration of marriage than the living brothers of the husband; but the truth is that, when courts of law or equity once depart from the plain and obvious construction of an Act of Parliament, there is nothing to guide or direct them, and it is not surprising that inconsistencies are to be found in their decisions. We have not been referred to any authority bearing directly upon the matter in question, and we cannot say that, upon the evidence at the trial, we are bound absolutely and conclusively, and as mere matter of law, to decide that the limitation in question is void against the plaintiff. We would act upon any decided case, but we do not feel inclined to put a construction upon this Statute which its words do not authorize, beyond what the courts of law and equity have already laid down."

In the earlier part of the judgment, Baron Channell referred to the case of *Newstead* v. *Searles*, West's Rep. 287, and said that it was "a direct authority, that a settlement by a widow, about to marry, upon her children by a former marriage, is good against a subsequent mortgagee." He looked upon that as a clear authority in favor of the general proposition that that was an exception from the ordinary rule. Having referred to *Clayton* v. *Earl of Winton*, 3 Madd. 302, *n.*, he seemed to have considered, having regard to those authorities, that there were such exceptions, and that this might be one; and he approved of the view that had been taken generally by the courts as to the application of the Statute of Elizabeth to purchasers taking with notice. He was influenced by, and determined the case upon the application of the cases of *Newstead* v. *Searles* and *Clayton* v. *Earl of Winton* to that particular case — also being greatly influenced by the moral consideration as to the propriety of providing for the children. When the case came before the Court of Exchequer Chamber there were very elaborate arguments and judgments. The Lord Chief Justice began by saying (6 H. & N. 870), "I am of opinion that the decision of the Court of Exchequer in this case should be affirmed, but I am unable to concur in the reasons on which the decision of that court appears to have proceeded." Then he went through those reasons, and said that they would not do at all, but said, "Nevertheless I am of opinion that this limitation may be upheld." He referred to *Newstead* v. *Searles* and *Clayton* v. *Earl of Winton*, and said that the present case appeared to him to come directly within the principle of *Newstead*

v. *Searles*. I have already said what I consider the principle of the decision in *Newstead* v. *Searles* to be; and for reasons which I have given, with the greatest respect for the Lord Chief Justice, I say that *Dickenson* v. *Wright*, 5 H. & N. 401, does not appear to me to come directly within the decision in *Newstead* v. *Searles*. Mr. Justice Blackburn approved of and adopted a paragraph from Mr. Dart's work, which says (6 Ibid. 865), "If such a stipulation cannot be presumed or proved" — a stipulation on the part of one of the contracting parties that the other contracting party shall settle some of his own property in a particular way — "the limitations must, it is conceived, be considered voluntary, and void as against a subsequent *bona fide* purchaser." Subsequently he said, "Yet when, as in *Newstead* v. *Searles* and *Clayton* v. *Earl of Winton*, and, as I think, in the principal case, the limitations so interfere with those which would naturally be made in favor of the husband, wife, and issue as to indicate that the limitations must have been discussed, and made part of the marriage contract, part of the reciprocal considerations between the husband and wife, that presumption is rebutted and the limitations are not voluntary." I say that I adopt what is here said by Mr. Justice Blackburn; but it is, I consider, inapplicable to the case now before me. The question which arises upon the construction of the settlement is: is it, or is it not, to be collected from the settlement that the intended wife stipulated that the intended husband should settle some of his own property upon his child by a former wife? I think not. I think the bargain was that the property should in substance, so far as regards the issue of the intended marriage and the intended wife, not be brought into settlement at all, but be left to the intended husband to make a settlement upon his son, this being, as a matter of convenience and economy, done by the same instrument as the settlement of the wife's property.

It was said that there was evidence to show that there was a contract made in favor of the child of the intended husband by the first wife. For that purpose reliance was placed upon the 6th paragraph of the answer of Thomas Jenkins the elder. But that paragraph, giving full weight to it, so far from supporting the proposition contended for, that this is a settlement, the result of a contract made by the intended wife in favor of the child of the husband by his first wife, is entirely the other way. [His Lordship read paragraph 6.] According to that statement, the defendant said, I stipulated with my intended wife that this property should be left to me in order to be settled upon my son; I was the party who was desiring and intending that to be done. She consented to my being able to do it; but it was no bargain on her part that any such settlement should be made. She claimed no interest in this property, but she left it out of settlement without making any requisition in respect of it, and left it to me, because I was anxious to make a settlement myself of that upon my son; I stipulated for that, and she consented; so that she merely gave her consent to that being

done by me for which I stipulated, and it was not a settlement made by her, or through her, or at her instance in any way." I refer to that in aid of the conclusion that this is nothing more than an ordinary voluntary settlement by a father upon his son, and is therefore inoperative as against a purchaser for valuable consideration. There must be a declaration to the effect that the settlement is inoperative as against the contract, and as against the conveyance to be made to the purchaser. There must be the usual declaration that the purchaser is entitled to specific performance, and a decree for that purpose. The original defendant must pay the costs of the suit; and as regards the son, who has been made a party, there will be no order as to costs.

From this decision the defendants appealed.

Morgan, Q. C., and *Maclean*, for the appellant.

The consideration for the settlement on the second marriage extended to the son by the former marriage. It was a bargain between all parties which was cemented by the marriage.

JAMES, L. J. Can an assignment of leasehold property ever be, strictly speaking, voluntary? I remember a case in my own practice at the bar, which is not reported, in which the owner of three leasehold houses made a promise on his deathbed to give one of them to his widow; and the executor accordingly signed a written agreement to assign one of the houses to the widow, she undertaking to pay an apportioned rent of one guinea to the ground landlord and performing the covenants of the lease. I advised that this was a *nudum pactum*, but it was held by Vice-Chancellor Shadwell to be an agreement for valuable consideration.

Dickinson, Q. C., and *Freeling*, for the plaintiff, were called on upon this particular point.

JAMES, L. J. It appears to me impossible to hold that this settlement was voluntary as regarded Thomas Jenkins the younger, who was himself one of the assignees of the leaseholds. The trustees came under a responsibility for payment of rent and performance of the covenants of the lease. It might be such a responsibility that a lessee might be actually willing to pay money to get rid of. If there is any valuable consideration for a settlement, the *quantum* of such a consideration is of no consequence under the Statute of Elizabeth. I think that here there was a valuable consideration sufficient to support the settlement against a subsequent purchaser. It appears to me impossible to distinguish it from such a case as that to which I referred during the argument. The purchaser's title cannot prevail against the trustees of the settlement. On that ground alone, therefore, I think the bill must be dismissed. But as the charge of fraud has been made by the defence, we must hear the evidence as to the circumstances under which the contract was made before disposing of the costs.

MELLISH, L. J., and BAGGALLAY, J. A., concurred.

The evidence as to alleged drunkenness of T. Jenkins the elder was then read and commented on.

The Court held that there was no ground whatever for the imputation; and, therefore, dismissed the action, without costs, either of the hearing before the Vice-Chancellor or of the appeal.

James, L. J., added: We desire it to be understood that we have expressed no opinion as to the point on which the Vice-Chancellor founded his judgment. That point has not been argued before us, and we give no opinion upon it.[1]

DE MESTRE *v.* WEST.

Judicial Committee of Privy Council. 1891.

[*Reported* [1891] *A. C.* 264.]

Appeal from a decree of the Supreme Court (March 11, 1889).

The appellants' statement of claim, which was dated the 29th of March, 1888, claimed in substance that the trusts of a certain settlement of the 16th of March, 1838, might be declared and established, and that the appellant, Mrs. De Mestre, might be declared, after the death of the respondent Harriet Sherwin, to one-fifth of certain lands comprised in the settlement. The question between the parties was whether George Taylor Rowe (the father of Mrs. De Mestre) was within the consideration for the settlement, or whether (as the court below decided) the settlement was a voluntary one as regards the interest taken by him under the settlement.

The settlement in question had been lost. But the court held it as proved to have been made, on the marriage of Harriet Sherwin with Thomas Deane Rowe, between William Henry Moore of the first part; Harriet Sherwin, then Harriet Hanks, of the second part; Thomas Deane Rowe of the third part; and W. W. T. Dowling of the fourth part. Thereby two parcels of land in New South Wales, the property of Harriet Hanks, were settled after the marriage to the use of herself for life, then to the use of T. D. Rowe for life, and after the death of the survivor of them to the use of the said George Taylor Rowe, their illegitimate son, for life, and after his death to the use of all the children of the said George Taylor Rowe as tenants in common in fee. The two parcels of land had been granted in fee simple to Harriet Hanks by the Government in 1831, conditionally on payment of certain yearly quit-rents, and on the erection by her or her heirs and assigns of permanent dwelling-houses, stores, or other suitable buildings, and on the construction of drains, and on conforming to the Government regulations for the time being.

At the date of the settlement George Taylor Rowe was unmarried, and an infant fifteen years old. The marriage took place on the 17th

[1] Followed in *Re Cameron and Wells*, 37 Ch. D. 32 (1887). See *Gale* v. *Gale*, 6 Ch. D. 144 (1877); *Harris* v. *Tubb*, 42 Ch. D. 79 (1889).

of March, 1838; Thomas Deane Rowe died on the 20th of November, 1838; Harriet Rowe married William Sherwin (since deceased) in 1839. George Taylor Rowe died in 1859, having in 1847 married the appellant Phœbe Rowe, and having had six children, viz., the appellant Mrs. De Mestre, two who died intestate and whose interests were represented by their mother, and three who assigned their interests to the respondent Harriet Sherwin.

In 1848 Mr. and Mrs. Sherwin and George Taylor Rowe mortgaged the said two pieces of land to Mrs. West, the mother of the respondent West; and in 1853 the same parties executed a second conveyance of the same property for the purpose of barring and defeating every estate tail at law or in equity of the conveying parties.

In 1869 Mrs. West executed a voluntary conveyance of the said lands to a trustee for the respondent John West.

To the appellants' statement of claim the respondent Harriet Sherwin put in no defence. But the respondent John West pleaded that if the settlement of 1838 was made as alleged, it was a voluntary deed liable to be defeated by subsequent sales for value, and submitted that his mother was a purchaser for value without notice of the settlement or of the equities of the appellants thereunder.

The primary judge in equity dismissed the appellants' suit with costs, on the ground that the ultimate remainder after the life of the said George Taylor Rowe in favor of his unborn children was voluntary, and as such had been avoided by the conveyance for value to Mrs. West.

Sir Horace Davey, Q. C., and *Alexander Young*, for the appellants.

Rigby, Q. C., and *O'Clare*, for the respondent West.

Arthur Young, for Mrs. Sherwin and De Mestre.

The judgment of their Lordships was delivered by

Earl Selborne. Their Lordships have considered the arguments addressed to them in this case, and they have come to the conclusion that it will be their duty to advise Her Majesty to affirm the judgment appealed from.

It is unnecessary to go into the history of the law upon this subject. The general rule has long been settled, that a voluntary conveyance, even though from the most honest motives and the most moral considerations, may be defeated, according to the construction which has been placed upon the Statute of 27 Eliz. *c.* 4, by a subsequent conveyance to a purchaser for value such as was made in this case. It has also been determined in a manner which it would be too late now to attempt to review, — in the case, amongst others, of *Sutton* v. *Chetwynd*, 3 Mer. 249; and in the Irish case of *Cormick* v. *Trapaud*, 6 Dow, 60, both decided by the House of Lords — that this rule is applicable to limitations in favor of volunteers under marriage settlements. Therefore, as the law is so settled, some special reason, consistent with that law, must be shown for taking any particular case out of the rule. Whether their Lordships would have established such a rule had the matter been new is not the question.

The case which has been mainly relied upon as an authority for allowing this appeal is one in the Court of Exchequer, of *Dickenson* v. *Wright*, 5 H. & N. 401, which was affirmed in the Court of Exchequer Chamber under the title of *Clarke* v. *Wright*, 6 H. & N. 849. Their Lordships probably would agree that, if that case ought to be followed, it might be an authority in support of the present appeal. But they observe not only that Lord St. Leonards, in editions of his book on Vendors and Purchasers, later than *Clarke* v. *Wright*, but subsequent judges — Vice-Chancellor Hall, a great judge in this branch of the law especially, and the present Lord Justice Kay — have unfavorably criticised that decision. And, when the reasons given for that decision and the state of opinion apparent from the report of what took place in the Court of Exchequer Chamber come to be examined, it seems to their Lordships impossible that it can be supported. In the Court of Exchequer, where the judgment was given by Baron Channell, it is apparent that the court proceeded upon the view that the case of *Newstead* v. *Searles*, 1 Atk. 264, was an authority for the proposition that a settlement, by a widow about to marry, upon her children by a former marriage is good against a subsequent mortgagee, putting it in that general way, without any reference to any more special reasons. And no doubt, if that had been so, it would have been difficult to resist the conclusion drawn by the Court of Exchequer, that by parity of reasoning the same rule would apply in favor of an illegitimate child. *Clayton* v. *Lord Wilton*, 6 M. & S. 67, was also referred to by the same learned judge as having determined that a limitation in a marriage settlement to the children of a possible second marriage is good, without reference to special circumstances. Unless the view so taken of those previous authorities of *Newstead* v. *Searles* and *Clayton* v. *Lord Wilton* was correct, the foundation of that judgment fails.

In the Court of Exchequer Chamber their Lordships find a very great conflict of opinion among the judges, and plainly the majority of the judges would have been for reversing the judgment below if they had not taken the same view of *Newstead* v. *Searles* and *Clayton* v. *Lord Wilton* which was taken by Channell, B. No doubt two very learned judges in that court, Blackburn, J., and Willes, J., put the case upon a different ground, and endeavored to explain in a different way the decisions in *Newstead* v. *Searles* and *Clayton* v. *Lord Wilton*; the ground taken by them being apparently this, that if it can be inferred from circumstances that the parties had specially in view, when they made their agreement, provision to be made for persons who would otherwise have been volunteers, they were no longer volunteers, because it was a matter of special bargain, although there might be no other valuable consideration for that agreement than the marriage. In other words, that, although *prima facie* provisions in favor of collaterals in marriage settlements were not within the marriage consideration, yet they might always be brought within it if the parties so intended. No other authority was cited in favor of that proposition; and, if sound, it

would go far to destroy the general rule; for it is recited in almost every marriage settlement that all the provisions made by it, whether for the parties themselves and the issue of the marriage, or for any one else, are made pursuant to agreement. And if, as Blackburn, J., appears to have thought, the acceptance by a husband of interests in his wife's property, different from those which the law would have given him if there had been a marriage without any settlement, would be a sufficient consideration to support limitations to collaterals against a purchaser for value, this, or something equivalent, may be said to occur in every case in which any property of the wife is brought into settlement. Nor do their Lordships think that the omission to provide in a marriage settlement for all or some of the issue of the marriage can operate as a consideration in favor of persons provided for by it who would otherwise be volunteers. The majority of the judges, in *Clarke* v. *Wright*, differed from Blackburn, J., on these points; and if *Newstead* v. *Searles* and *Clayton* v. *Lord Wilton* had been understood as their Lordships understood those cases, *Clarke* v. *Wright* would not have been decided as it was.

Under those circumstances it appears to their Lordships to be their duty to advise Her Majesty in accordance with the view which they themselves take of *Newstead* v. *Searles* and *Clayton* v. *Lord Wilton*, and which was taken by the House of Lords in *Mackie* v. *Herbertson*, 9 App. Cas. 303. The order of the limitations in both those cases was such, that the limitations which were not within the marriage consideration were covered by those which were, so that those which were within the marriage consideration could not take effect in the form and manner provided by the instrument without also giving effect to the others. It was on that ground, and not from any special favor to provisions for the benefit of children who were not issue of the marriage, that their Lordships consider both those cases to have been determined. If similar circumstances should occur in any other case, it may be inferred from what was said in the House of Lords in *Mackie* v. *Herbertson* that the same principle would be applied; and indeed the principle seems to be clear; for the settlement in any such case could not be defeated without defeating the interests of children unquestionably within the consideration of marriage. There is no authority for the proposition that under the Statute a particular limitation can be picked out of the middle of a settlement, or the shares of some persons who would take *pari passu* with others according to the terms of the settlement picked out, in order to be destroyed, in favor of a subsequent purchaser; leaving subsequent or concurrent interests of persons who were within the consideration of marriage under the same settlement undisturbed.

The only question in their Lordships' view which remains is, whether in this case there are special circumstances which bring it within the principle of *Newstead* v. *Searles* and *Clayton* v. *Lord Wilton*, so understood. The property settled was that of the wife only. No con-

sideration, except that of marriage, proceeded from the husband. There is an ultimate limitation of the property which the wife is herself settling to her heirs, subject to a general power of appointment, not in favor of any particular persons within the marriage consideration, but in those general forms in which it may be said that in almost all settlements the ultimate undisposed of and unsettled interest is reserved back to the settlor, or subject to the appointment of the settlor. It seems to their Lordships impossible to hold, that this is enough to bring a case within the principle of *Newstead* v. *Searles*. Then does the interposed provision about raising money for the benefit of the illegitimate son of the wife during the lifetime of the husband and wife, or either of them, make any difference? However that provision ought to be construed, it was only a power to raise a sum not exceeding a certain amount, during a certain period of time, which is not alleged to have been, and which their Lordships must assume not to have been, executed. Their Lordships do not think it necessary to determine whether Mr. George Taylor Rowe, the illegitimate son, could have insisted on the exercise of that power, if he had claimed to have it executed in his favor, or not. He is dead, and the question is not with him; but it is with those who come last in the order of the settlement, — his issue. It was not for them that this money was to have been raised, if it had been raised at all. No doubt if it had been raised they would have had an ultimate interest in it under the settlement; but in the present suit no claim is made on the footing that it ought to have been raised. Their Lordships think, therefore, that there are not in this settlement any special provisions sufficient to bring it within *Newstead* v. *Searles;* and that the court below was right in holding the case to fall within the general rule. The appeal must therefore be dismissed, and their Lordships will so advise Her Majesty. The appellants will pay to the respondent West his costs of this appeal.

ANDERSON *v.* ROBERTS.

NEW YORK COURT FOR THE CORRECTION OF ERRORS. 1820.

[*Reported* 18 *Johns.* 515.]

APPEAL from the Court of Chancery. The bill stated, that Robert Roberts, being a creditor of William Griffith, with a view to secure some part of his debt, on the 22d March, 1810, purchased a bond and mortgage executed by Griffith to Aaron Lyon; the mortgage being on part of a lot of ground in the village of Newburgh, and was registered on the 29th of May, 1806. Roberts having paid L. the consideration of 214 dollars and 25 cents, and received an assignment of the bond and mortgage, took possession of the mortgaged premises, together with the

residue of the lot, and the house thereon, and let the same to Hector M'Leod, who entered into possession thereof, as his tenant. Benjamin Taylor, who had obtained a judgment against G. on the 14th of May, 1808, for 128 dollars and 10 cents, issued an execution thereon, by virtue of which the premises were sold by the sheriff, at public auction, to the highest bidder, Samuel Boyd, for thirty dollars, and the sheriff executed a deed of the premises, accordingly, to B., who made the purchase merely as trustee for the respondent, Roberts. The bill further stated, that G. being indebted to several creditors, and there being suits pending against him, in order to defraud his other creditors, did, on the 20th of January, 1820, convey the mortgaged premises to one Sarah Johnson, for the nominal consideration of 2,000 dollars, and, by another deed, conveyed to her the other part of the lot for the nominal consideration of 1,500 dollars. The bill charged that these conveyances were collusive and fraudulent; and that S. J. never having paid any consideration for them, she was a mere trustee for W. G.; and that the land was, afterwards, reconveyed to him, before Isaac Clason obtained his judgment against Sarah Johnson; and that he continued to possess and enjoy the property as his own after those conveyances. That, in 1811, the defendants pretending to claim the land under a deed from the sheriff, on a sale of the premises, the 1st of January, 1810, by virtue of an execution on the judgment in favor of Isaac Clason against S. Johnson, brought an action of ejectment against M'Leod, and obtained a verdict against him, on producing the deed from the sheriff, and proving that on the 1st of May, 1810, M'Leod took a lease from the appellants. The bill charged that the lease so taken by M. from the appellants, being after he became tenant to the respondents, was void, and the attornment fraudulent. The bill prayed that the conveyances from W. G. to S. J. might be declared fraudulent and void, and that the sheriff's deed to the appellants, and all other deeds from S. J., or any grantees under her, to the appellants, of the premises, or any parts thereof, might be declared fraudulent and void, and be delivered up to be cancelled, and that all proper parties might release to the respondent R. and for an injunction, &c.

The defendants, in their answer, denied all knowledge of the claim of the respondents against G. They admitted the mortgage from G. to Lyon, but alleged that they were ignorant of the assignment to Roberts, or of any lease from him to M'Leod; and denied that Roberts had any possession, legal or constructive, of the premises. They averred, that there was no judgment against G. when he conveyed the premises to Sarah Johnson. That B. S. Anderson, and S. B. and N. Boyd, were present at the sale by the sheriff, under Taylor's judgment; and that they were informed by Anderson of his purchase under Clason's judgment; that the judgment of Clason was obtained against S. J. the 15th of May, 1809, for 346 dollars and 88 cents; and on the 13th of December, 1809, the premises were sold under an execution on that judgment, subject to all prior encumbrances; B. Anderson,

appellant, became the purchaser, for one dollar and fifty cents, and his father, J. A., became jointly concerned with him in the purchase. S. J. had executed a mortgage of the premises to D. Stansbury, for 496 dollars and 88 cents; and W. King had some equitable claim on the property; and the appellants agreed to pay S. J. 167 dollars, and take a release, or quit-claim, of her right; to discharge Stanbury's mortgage, and pay W. K. 300 dollars for his lien, which was accordingly done, on the 21st of March, 1810. The appellants alleged that they had not heard of the claim of the respondents, until after they had paid all these sums of money, and denied all notice, and every charge of fraud or collusion; and claimed to hold, as *bona fide* purchasers, without notice. That they tendered to the respondent, Roberts, 250 dollars, the amount of the mortgage to him, &c.

A *replication* was put in, and witnesses examined, and proofs taken by the parties. The material points proved, appear in the opinion of the court.

The cause was brought to a hearing in the Court of Chancery, in June, 1818. The Chancellor decreed that the two deeds to Sarah Johnson were fraudulent and void, and that the plaintiffs ought to be quieted against any claims on the part of the defendants under those deeds, and that a perpetual injunction be issued for that purpose.

The Chancellor assigned his reasons for the decree. (*Vide* s. c. 3 Johns. Ch. Rep. 371.)

Mitchill and *Burr*, for the appellants.

Boyd and *S. Jones, Jr.*, contra.

SPENCER, C. J. The principal question which has been discussed, is not free from difficulty. It is one that ought to be definitely settled. Indeed, it is matter of surprise, that a Statute of such long standing as the 13th of Eliz. *c.* 5, should not have received a settled construction in the English courts. The want of authority on this point makes neither for nor against either of the parties. The second section of our Statute (1 N. R. L. 75), for the prevention of frauds, is a transcript, substantially, from the 13th of Eliz. *c.* 5; and the 3d section of the same Statute is a transcript of the 27th of Eliz. *c.* 4. To both the British Statutes there was nearly the same proviso as is contained in the 6th section of our Statute. It provides and enacts that the Act, or anything contained therein, shall not extend or be construed to impeach, defeat, make void, or frustrate *any conveyance*, *&c.* of, in, to, or out of any lands, &c., goods or chattels, at any time heretofore had or made, or to be made, upon or for good consideration, and *bona fide*, *to any person*, *&c.*, not having at the time of such conveyance or assurance made, any manner of notice or knowledge of such covin, fraud, or collusion as aforesaid.

The Chancellor admits the law to be settled, that under the 27th of Eliz. a purchaser for a valuable consideration, and without notice, from a voluntary or fraudulent grantee, shall be preferred to a subsequent

purchaser, for valuable consideration from the original grantor. The cases he has cited show that such has been the uniform construction of cases arising under the 27th of Eliz. Sugden (Law of Vendors, 436) and Newland (On Contracts, 404) consider this construction as entirely settled. But the Chancellor is of opinion that a different rule of construction prevails under the 13th of Eliz., which protects creditors from fraudulent conveyances by their debtors. His idea is, that the Statute, in its enacting clause, operates on the deed from the fraudulent debtor, and that the proviso in the Act applies to that original conveyance from the debtor, and saves it, when made to a *bona fide* purchaser, for valuable consideration; and that such a conveyance is supported by the proviso, however fraudulent the intention of the grantor may be; that the original deed from the debtor to a fraudulent grantee, is utterly void as to creditors, and, as against them, the grantee can make no conveyance, for he has no title, as against them, on the ground that the proviso does not extend to such subsequent conveyance by the fraudulent grantee. He thinks that the contrary doctrine would defeat the policy of the Act; and that there is no analogy between a conveyance by the grantee under the 27th, and under the 13th of Eliz., for, in the former case, he has a good title until the conveyance from him, or from the first grantor to a *bona fide* purchaser, takes place; whereas, in the latter case, his title as against the creditor was absolutely void from the beginning. I cannot assent to the correctness of these positions. On the contrary, it appears to me, there is a strong, close, and decisive analogy between the two Statutes; and the proviso in the 6th section of our Statute, illustrates the sense of the Legislature, that the same construction is applicable to both the Statutes. It has been suggested by the Chancellor, that in the revision of our laws, the provisos to the British Statutes were consolidated in the 6th section of our Statute; and that the principle is, that the construction is to be the same since, as before the revision. I apprehend, that the provisos to both Statutes are alike, and that there never has been a difference of construction upon them. Indeed, it has been admitted on all hands, that we are entirely without decisions in the English courts, upon the 13th of Eliz.

The main position on which the difference of construction rests, is, that the original deed from the debtor to a fraudulent grantee, is "utterly void" as to creditors. This ground entirely fails, for the Statute of 27th of Eliz. provides, that all conveyances made to defraud purchasers, shall be deemed and taken to be "utterly void, frustrate, and of none effect." It is true, that there may be this difference between the Statutes; a conveyance to defraud purchasers, generally operates only on those who purchase of the original grantor, subsequent to the fraudulent conveyance; whereas, a conveyance to defraud creditors may, and in most cases is, intended to defraud existing creditors; but it is an undeniable proposition, and such has been the uniform course of decision, that the Statute of 13th of Eliz. equally protects creditors whose debts accrue subsequent to the fraudulent conveyance,

as those whose debts were due when it was made; and I cannot perceive the least difference between a conveyance to defraud subsequent creditors, and a conveyance to defraud subsequent purchasers. The 13th of Eliz. declares a conveyance to be void only as against creditors, &c. attempted to be defrauded, whilst the 27th of Eliz. declares the conveyance to be void only as against those who have purchased, or may purchase; but, as against the fraudulent grantors, in both cases, the conveyances are valid and effectual, and wholly unaffected by the provisions of either Statute. What becomes, then, of the estate, and in whom is it vested, after a conveyance made to deceive existing creditors, or those who become creditors subsequent to the fraudulent conveyance? As against the grantors, the conveyance is effectual. Subsequent creditors having no debt due at the time, the possibility of their having debts cannot prevent the conveyance from taking effect. Those creditors whose debts are due, even if they have obtained judgments, and acquired a *lien*, have gained no vested interest in the lands; and they may be paid, without resort to the land fraudulently conveyed. The fee is not in abeyance, and the inevitable conclusion is, that the legal title has vested in the fraudulent grantee, subject to be devested, if the creditors see fit to call in question the fraudulent conveyance, and after the creditor has proceeded to sell, on execution, the lands thus fraudulently conveyed. This was so decided in the Supreme Court in *Osborne* v. *Moss*, 7 Johns. Rep. 161, and in *Hawes* v. *Leader*, Cro. Jac. 270, and Yelv. 196. In both cases, it was decided, that if goods were conveyed to defraud creditors, the conveyance was void only as against them, but remained good as against the party, his executors and administrators.

In my judgment, the error of those who assert, that a fraudulent grantee under the 13th of Eliz. takes no estate, because the deed is declared to be *utterly void*, consists in not correctly discriminating between a deed which is an absolute nullity, and one which is voidable only. No deed can be pronounced, in a legal sense, utterly void, which is valid as to some persons, but may be avoided, at the election of others. In 2 Lilly's Abr. 807, and Bac. Abr. tit. Void and Voidable, we have the true distinction. A thing is void which is done against law, at the very time of doing it, and where no person is bound by the act; but a thing is voidable which is done by a person who ought not to have done it, but who, nevertheless, cannot avoid it himself, after it is done. Bacon classes under the head of acts which are absolutely void, to all purposes, the bond of a *feme covert*, an *infant*, and a person *non compos mentis*, after an office found, and bonds given for the performance of illegal acts. He considers a fraudulent gift void, as to some persons only, and says it is good as to the donor, and void as to creditors. Whenever the act done takes effect as to some purposes, and is void as to persons who have an interest in impeaching it, the act is not a nullity, and therefore, in a legal sense, is not utterly void, but merely voidable. Another test of a void act or deed, is that

every stranger may take advantage of it, but not of a voidable one. 2 Leo. 218. Viner, tit. Void and Voidable, A. pl. 11. Again; a thing may be void in several degrees: 1. Void, so as if never done, to all purposes, so as all persons may take advantage thereof; 2. Void to some purposes only; 3. So void by operation of law, that he that will have the benefit of it, may make it good. Viner, tit. Void and Voidable, A. pl. 18. In *Prigg* v. *Adams*, 2 Salk. 674, the defendant justified as an officer, under a *ca. sa.*, on a judgment in the Common Pleas, upon a verdict of 5*s.*, for a cause of action arising in Bristol. The plaintiff replied, the private Act of Parliament, for erecting the Court of Conscience in Bristol, wherein was a clause, that if any person bring such action in any of the courts at Westminster, and it appeared upon trial to be under 40*s.*, that no judgment should be entered for the plaintiff; and that if it be entered, that it shall be *void*. Upon demurrer, the question was, whether the judgment was so far void, that the party should take advantage of it in this collateral action. The court held, that it was not void, but voidable only, by plea or writ of error. Upon authority, therefore, I insist, that the expressions in the Statutes of 13th and 27th of Eliz., that conveyances, in contravention of those Statutes, shall be deemed *utterly void*, &c., must necessarily be construed, as voidable only by the party aggrieved. It seems to me, that the construction upon the 27th Eliz., in which the same words are used, is applicable to the 13th of Eliz. In the present case, the respondents claim the premises under a judgment obtained against Griffith, the fraudulent grantor, subsequent to the fraudulent conveyance to Sarah Johnson; so that, when the deed was given to her, there was no lien on the estate conveyed, and it was a matter of entire contingency, whether the property conveyed would be necessary to pay that debt.

This point has been decided in the Supreme Court, in the case of *Jackson, ex dem. Merrit* v. *Terry*, 13 Johns. Rep. 471. The plaintiff deduced a title under A. Turner to J. Turner, for the consideration of 400 dollars, by a deed dated the 24th of September, 1804, and a deed from J. Turner to the lessor, dated the 9th of April, 1806. The defendant gave in evidence a judgment, on the fourth Tuesday of September, 1804, in favor of one Hubbard, against A. Turner, and a sale under an execution thereon, to one Wood, on the 10th of April, 1805. Thompson, C. J., in giving the opinion of the court, admitted that the conveyance from A. Turner to J. Turner, was a gross fraud, and made expressly to avoid Hubbard's judgment; but that the lessor, being a *bona fide* purchaser from J. Turner, without knowledge of the fraud, he was not to be prejudiced by it; and judgment was given for the plaintiff. In the case of the lessor of *Hartly* v. *M'Anutty*, 4 Yeates' Rep. 95, it was decided that a voluntary conveyance to defraud creditors, passed the estate to the grantee; and that the lands conveyed were, in his hands, subject to his creditors.

The Chancellor adopts the reasoning of the majority of the Court of

Errors in Connecticut, in *Preston* v. *Crofut*, 1 Con. Rep. 527, note. That case was very ably discussed by whose who maintained different opinions; and, it is manifest, that it was decided on the peculiar structure of the Statute, which was taken from the 13th of Eliz., of that State, without the *proviso*. The counsel who argued for the party who had judgment, expressly admit, that had the proviso to the 13th Eliz. been annexed to their Statute, it would have precluded all controversy on the subject; and the same counsel admit, that a sale on good consideration, with intent to defraud creditors, to one who is ignorant of the intent, is valid, under their Statute; although such a case is embraced in the general words of the proviso, in the 13th of Eliz., though for that only, the proviso would have been unnecessary. The reason (they argued) of providing for a subsequent purchaser, must have resulted from the very construction of the enacting clause for which they contend, and the same construction would render any proviso for the immediate vendee of the debtor unnecessary. In the latter case, the vendee takes from one who has a title to convey: in the former, the title of the subsequent *bona fide* purchaser being intercepted, by the enacting clause, a proviso is necessary to give efficacy to the deed. My opinion, in *Sands* v. *Hildreth*, 14 Johns. Rep. 499, has been referred to, to show that I considered a deed given by a debtor, with a view to defraud his creditors, to a *bona fide* purchaser, as protected by the 6th section of our Statute. I agree with the counsel whose arguments I have quoted, that the expressions of the proviso were broad enough to embrace such a case; but I never was of the opinion, that the common law, or the Statute of 13th of Eliz., without the proviso, would have affected a deed, where, though the intention of the grantor was fraudulent, yet the grantee was a *bona fide* purchaser for valuable consideration. That case did not call for the expression of an opinion upon such a case as the present. The terms of the proviso are broad and extensive: they apply to any conveyance, whether from the fraudulent grantor, or fraudulent grantee. It meant to protect a *bona fide* purchaser for valuable consideration, without notice of the fraud, from the operation of the Statute. This, it appears to me, is manifest, as well from the internal evidence of the proviso, as from the plainest maxims of equity and justice. By the proviso, the Act, or anything contained in it, shall not extend, or be construed to impeach, defeat, &c., *any conveyance* of any lands made *upon good consideration and bona fide*, to any person, not having, at the time of such conveyance to him made, any manner of *notice or knowledge of such covin, fraud, or collusion*, as is aforesaid. The enacting clause had pronounced as fraudulent and void, those conveyances only which are devised and continued, of malice, fraud, covin, collusion, or guile, to delay, hinder, or defraud creditors, &c.; and, most certainly, it contemplated two parties to the collusion and fraud, the grantor and the grantee. The words in the proviso, *notice or knowledge of such covin, fraud, and collusion*, are not applicable to the original parties, but embrace subsequent purchasers only.

Again, the proviso is general; it exempts *any conveyance* upon good consideration, and *bona fide, to any person,* not having notice of the fraud or collusion, from the effects of the enacting clause. And why should not its benefits be extended to any *bona fide* purchaser for valuable consideration, whether he purchases from the fraudulent grantor or the fraudulent grantee? I trust it has sufficiently appeared, that the fraudulent grantee takes the entire interest of the fraudulent grantor; and that the deed is voidable, at the instance of the creditor, not legally and strictly void. The general principle why a *bona fide* purchaser, for valuable consideration, ignorant of the covin, is secure in his purchase, is well illustrated by Chief Justice Marshall, in *Fletcher* v. *Peck*, 6 Cranch, 133. He says, "If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside as between the parties; but the rights of third persons, who are purchasers without notice for a valuable consideration, cannot be disregarded. Titles, which according to every legal test, are perfect, are acquired with the confidence which is inspired by the opinion, that the purchaser is safe. If there be any concealed defect arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law; he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if this principle be overturned."

Where the reason is the same, the law must be the same. It is in vain that we search for any difference between a conveyance by a fraudulent grantee, where the intention was to deceive subsequent purchasers, and a conveyance by a fraudulent grantor, where the intention was to defraud present or future creditors. Some distinctions have been attempted, but they strike me as too refined and subtle for practical use. The ground adopted by the courts, for protecting *bona fide* purchasers, without notice, is solid and substantial, and applies, with equal force, to both descriptions of grantees. In *Progder* v. *Langham*, 1 Sid. 133, it is stated, "For although the estate of the first feoffor was, in its creation, covinous, and so void, against a purchaser for valuable consideration from the first feoffor, that feoffment shall be preferred to a subsequent feoffment from the first feoffor." The same principle was adopted in *Andrew Newport's Case,* 2 Skinner, 423. Roberts (Fraud. Con. 497), after citing those cases, says, "The valuable consideration, whenever it occurs, entirely obliterates the fraud, so that it can never again, in any shape, affect the transaction." The principle is, that although a deed be fraudulent in its creation, yet by subsequent matter, it may acquire validity, in favor of a purchaser, for valuable consideration. And where two persons have equal equities, the maxim applies, *Qui prior est in tempore potior est in jure.* It was pertinently observed by the counsel in *Preston* v. *Crofut*, "Whether

the exposure of purchasers to the loss of property fairly bought of a fraudulent vendor, was a greater evil, than forever to deprive the creditor of his claim, after a *bona fide* sale, was a question proper for the consideration of the Legislature." In my judgment, they have decided it in favor of the purchaser from a fraudulent vendee. I must be understood, as qualifying the right of the purchaser from the fraudulent vendee. It must be prior, in point of time, to a sale for a valuable consideration, by the fraudulent grantor; and it must, also, be prior to a sale on execution, at the suit of the creditor. Although, in *Jackson* v. *Tracy*, the sale under the judgment was prior to the deed from the fraudulent grantee, yet, in that case, the registry of the latter deed first took place, and the transaction happened in a county where deeds are required to be registered.

In the present case, S. Johnson gave a mortgage to Daniel Stansbury on the 28th of March, 1808, on the premises, to secure the payment of 330 dollars and 89 cents; and this mortgage was prior to Taylor's judgment, under which the respondents claim; and it stands uninfected with notice, or the want of consideration.

One of the objects of the bill was to be relieved from the effect of the judgment in ejectment obtained by the appellants against M'Leod. The facts are, that the appellants brought an ejectment against him; he alone appeared and defended. The cause was tried, and a verdict and judgment passed against him. The respondents insist, that M'Leod was their tenant, prior to his becoming a tenant to the appellants, and that if he attorned to them, the attornment was void; that their possession has not been changed; and that the appellants ought not to be permitted to proceed to change the possession, under their judgment, and thereby put the respondents to the necessity of bringing an action at law to recover possession. The appellants deny any knowledge of any agreement between the respondents and M'Leod, for leasing the premises, and they state and rely upon the trial and judgment.

The Chancellor, in the first instance, granted an injunction staying all proceedings on the judgment in ejectment; and the final decree renders the injunction perpetual. The objections are, that M'Leod is not made a party to this suit; and had he been a party, the decree would, nevertheless, be erroneous.

It is an undoubted principle, that a court of equity will not relieve, where the bill is in the nature of a bill for a new trial, in a court of law. After a verdict, a bill of discovery does not lie in support of a fresh action. Thus, when a plaintiff, not being able to prove a letter written by him to the defendant, filed a bill of discovery, to clear up the matter, the defendant pleaded the verdict, and demurred for want of equity, the plea and demurrer were allowed (Ch. Cases, 65; 8 Viner, 512). Where money was paid in part, for goods sold, and the receipts were lost, and the whole was recovered at law, a bill of discovery was then filed, and Lord Keeper North said, "You come too late for a discovery after verdict." But this question underwent a very full and solemn examination

in this court, in *Simpson* v. *Hart*, 14 Johns. Rep. 63, and in the Court of Chancery (1 Johns. Ch. 91). It was clearly held, in that case, that where courts of law and equity have concurrent jurisdiction over a question, and it receives a decision at law, equity can no more re-examine it, than the court of law, in a similar case, can re-examine a decree in the court of equity. The case of *Bateman* v. *Witloe*, 1 Sch. and Lef. 201, was referred to with approbation. In that case, a verdict was obtained at law, which the plaintiff considered unjust, and having failed in his application for a new trial, he sought relief in equity; but the bill was dismissed. Lord Chancellor Redesdale said, he could not find any ground whatever for a court of equity to interfere, because a party had not brought evidence which was in his power, at the time, or because he had neglected to apply, in due time, for a new trial. He observed, that there were cases where a verdict has been obtained by fraud, or where a party has possessed himself improperly of something, by means of which he has an unconscientious advantage at law, which equity will either put out of the way, or restrain him from using; but, without circumstances of that kind, he did not know that equity ever does interfere to grant a new trial of a matter which has been discussed in a court of law; a matter capable of being discussed there, and over which the court of law had full jurisdiction. In *Simpson and Hart*, the Chancellor said, it was the settled doctrine of the English Chancery, not to relieve against a judgment at law, on the ground of its being contrary to equity, unless the defendant below was ignorant of the fact in question, pending the suit, or it could not be received as a defence. It is true, that the decree in that case was reversed; but the principles were admitted to be sound, though they were considered inapplicable to the facts of that case.

The respondents must be considered either as strangers to the ejectment suit, or as having defended the same in the name of M'Leod. In the first case, the subject-matter of that suit was *res inter alios acta;* and it never can be allowed to them to overhaul or draw that trial in question. They are mere intruders into that controversy, and have no right to impeach the proceedings. In the second case, if having had notice of the ejectment, instead of making themselves defendants, as they might have done, if they were the real landlords, they have chosen to defend the suit in M'Leod's name, they have waived their right to question the proceedings in this manner. But their rights at law were not concluded in an independent suit. The Supreme Court, in denying the motion for a new trial (12 Johns. Rep. 183), expressly said, that although M'Leod, after having been proved to be a tenant to the appellants, could not set up a tenancy under Roberts, and was bound to restore them the possession; yet, that the rights and claims of others to the premises, could be tried after the possession had been given up.

There existed, then, no impediment to the respondents bringing their action at law; and I must consider it a novel doctrine, not to be sanctioned, that a court of equity will take cognizance of questions purely

of a legal nature, and within the acknowledged jurisdiction of a court of law. I wish not to be understood, as insinuating, that the Court of Chancery, on the present occasion, has intentionally invaded the jurisdiction of the common law courts. I am sure it would not do so; yet, I cannot avoid considering the entertaining this bill, as such encroachment. The appellants have not precluded themselves from making the objection. They have insisted, in the answer, on the trial and verdict at law, as precluding the respondents. By the judgment at law, the appellants have acquired a right to recover possession of M'Leod, and, also, to recover their mesne profits and costs; of this right, the decree deprives them in part.

The principle, that a court of equity will give relief in cases of fraud, is undoubted. It is a principal object of equity jurisdiction; but, on the principles I have advanced, in considering the first point, a court of equity ought not to decree against a *bona fide* purchaser for valuable consideration, without notice, though his title be derived from a conveyance intended to defraud creditors. The appellants have answered, under oath, that they are such purchasers, and, consequently, they are within the protection of the proviso to the Statute.

I am for reversing the decree, and dismissing the respondents' bill, on both grounds: 1. That the respondents have made out no case for relief in equity; and 2. That the appellants have established their title to protection, in their purchase of the Stansbury mortgage.[1]

The rest of the court concurred in the opinion delivered by his Honor the Chief Justice; and it was thereupon ORDERED, ADJUDGED, and DECREED, that the decree and orders of his Honor the Chancellor, complained of, in this cause, be reversed; and that the respondents' bill be dismissed, and that the injunction thereupon ordered, be dissolved; and that the respondents, Robert Roberts and Samuel Boyd, pay to the appellants their costs to be taxed, and that the record and proceedings be remitted to the Court of Chancery, to the end that this decree may be carried into execution.

Decree of reversal.

MANHATTAN COMPANY *v.* EVERTSON.

COURT OF CHANCERY OF NEW YORK. 1837.

[*Reported* 6 *Paige*, 457.]

THE bill in this case was filed to foreclose a mortgage given to the complainants by G. B. Evertson and his wife in 1824. A decree of foreclosure was entered, and a part of the mortgaged premises lying in the County of Delaware in the Southern District of New York, and in the towns of Galen and Ulysses in the Northern District, were sold

[1] The opinion of PLATT, J., is omitted.

under the decree. The lands in Delaware County sold for $100; those in Galen for $900; and those in Ulysses for $11,500; the proceeds of which sales, after paying the debt and costs of the complainants, left a surplus of about $8,000. A reference was thereupon directed, according to the provisions of the 136th rule, to ascertain and report the rights of the several defendants in this surplus fund, and the priorities of their several liens thereon. The master decided and reported that J. Emott was entitled to priority of payment out of the fund for a debt of $1,500, due from the mortgagor, secured by a deed of trust, and that he was also entitled to the interest thereon; that after the payment of that debt and interest, Mary Evertson, the widow of the mortgagor, was entitled to her dower in the residue of the fund; that Corlies, Mabbett & Co., who had obtained a judgment against the mortgagor in the Supreme Court in May, 1827, had a lien upon the fund and were next to be paid the amount due upon their judgment, with interest; that a judgment in the name of Flagler against G. B. Evertson and W. Davis as his surety, which had been paid by Davis and assigned to F. L. Davis as a trustee for him, was the next lien upon the fund, and that the assignee was entitled to payment of the amount due, although it appeared that G. B. Evertson had made an absolute conveyance of lands to W. Davis to secure the payment of that debt; that Smith and Howland and the Dutchess County Bank had liens upon the fund for the amount of their respective judgments against the mortgagor, docketed in May, 1828, and were next in the order of priority; that G. and F. Searls, who had recovered a judgment against the mortgagor in June, 1828, in the Circuit Court of the United States for the Southern District of New York, had a lien upon the fund for the whole amount of their judgment, although the proceeds of the lands lying in the Southern District were much less than the amount due on such judgment, and that they were next to be paid; and that J. Lockwood, who had subsequently recovered a judgment in the Supreme Court against G. B. Evertson and J. R. Evertson for about $5,000, was entitled to the residue of the fund.

G. B. Evertson, previous to the recovery of any of the judgments against him, had conveyed the mortgaged premises to J. R. Evertson, who executed a separate declaration of trust, among other things, to sell the same and after paying the encumbrances thereon to pay J. Emott $1,500. And in October, 1828, J. R. Evertson mortgaged the Ulysses lands to Lockwood to secure the payment of the judgment against himself and G. B. Evertson. The counsel for Lockwood and J. R. Evertson, therefore, claimed that Lockwood's mortgage and judgment should be paid next after the $1,500 to Emott; and that J. R. Evertson was entitled to the whole of the residue of the fund. This claim, however, was disallowed by the master, on the ground that the conveyances to J. R. Evertson were fraudulent and void as to the creditors of Evertson, some of whom had commenced suits for the recovery of their debts at the time these conveyances were executed. Lockwood and

J. R. Evertson thereupon excepted to so much of the report as allowed interest to Emott on his debt of $1,500, and as allowed dower to the widow in the residue of the fund. They also took a distinct exception as to the allowance of the claim of each of the judgment creditors, either as a lien upon the fund or as to their respective judgments being entitled to a priority in payment over the judgment and mortgage of Lockwood. A further exception was taken to the allowance of the claim of G. and F. Searls on the ground that it was not presented to the master in time. The Vice-Chancellor, upon the hearing of the exceptions, allowed the same so far as related to the widow's claim of dower in the surplus fund and the claim of Davis under the Flagler judgment. The residue of the exceptions were disallowed. From the decision of the Vice-Chancellor disallowing their exceptions to the report, except the first relative to the interest on Emott's claim, Lockwood and Evertson appealed to the Chancellor. They afterwards, however, stipulated to abandon the appeal as to the tenth exception, which related to the time within which the claim of G. and T. Searls was presented to the master.

The following opinion was delivered by the Vice-Chancellor upon the exceptions.[1]

S. Cleveland, for the appellants.

D. D. Field, for the respondents G. and T. Searls.

C. Johnson, for the respondents except G. and T. Searls.

The Chancellor [Walworth]. Whether the conveyances from G. B. Evertson and wife to J. R. Evertson were absolutely void as against the creditors of the grantors, or operated as a valid transfer of the legal title, subject to a resulting trust in G. B. Evertson for the surplus after paying the mortgage to the complainants, the Vice-Chancellor was right in supposing the widow was not entitled to dower in the surplus. In either case, as between the grantors and grantee, the legal title passed to the latter; and previous to the Revised Statutes the widow could not be endowed of a mere equity. It is very evident, however, from the facts in the case, that although the legal title passed to J. R. Evertson by the conveyances, they must be considered as void as regards the rights of the creditors of G. B. Evertson, except so far as those rights were protected by the declaration of trust. I think therefore the judgments in the Supreme Court in favor of the respondents against G. B. Evertson, some of which were rendered in suits actually pending at the time when these conveyances were executed for the nominal consideration of one dollar, were valid liens upon the mortgaged premises at law as well as in equity. The decision of the Vice-Chancellor was therefore right in declaring that such judgments were a lien upon the fund, and entitled to priority in payment over the judgment subsequently recovered against the grantor and grantee in favor of Lockwood. Neither did the giving of the mortgage to Lockwood by J. R. Evertson upon the Ulysses land, subse-

[1] The opinion of Ruggles, V. C., is omitted.

quent to the recovery of these judgments, entitle him to a preference in payment. If money or other things of value had been advanced upon the faith of this mortgage, Lockwood might have claimed a preference in payment out of the fund, upon filing an affidavit with the master that he had no notice of the fraud at the time he advanced his money or other property upon the faith of the mortgage. But a party claiming as a *bona fide* purchaser must deny notice although it is not charged in the bill. And in this case, as the mortgage was given merely as a further security for antecedent debts, the prior equity and legal rights of the other judgment creditors must prevail as against one who cannot protect himself as a *bona fide* purchaser.

There can be no doubt as to the right of the respondents G. and T. Searls to have their judgment satisfied out of the fund to the extent of the proceeds of the Delaware lands; as the legal title to those lands was bound by the lien of their judgment several months prior to the recovery of the judgment in favor of the appellant. Their right to payment of the residue of their judgment out of the fund depends upon the question whether a judgment in the United States Court for the Southern District of New York is a lien upon lands lying within the Northern District; which question I will next proceed to consider.

[The Chancellor resolved that such judgment was a lien.]

Although I had great doubt upon the subject of the lien of the Searls' judgment upon the Galen and Ulysses lands at the time of the argument, subsequent examination and reflection induces me to think the decision of the Vice-Chancellor was right on this question as well as upon other parts of the decretal order appealed from. The order or decree must therefore be affirmed, with costs. And as the respondents, G. and T. Searls, have been deprived of the use of their part of the fund by the appeal, if it has not been invested in the mean time so as to produce legal interest, the appellants must pay them sufficient by way of damages for the delay to make up to them their legal interest pending the appeal, upon the amount allowed by the master.

PRIORITY IN EQUITY. — This is so fully treated in the course on the Law of Trusts that it is here omitted.

CHAPTER II.

REGISTRATION.

SECTION I.

STATUTES.

St. 7 Anne, c. 20 (1708). Whereas by the different and secret ways of conveying lands, tenements, and hereditaments, such as are ill disposed have it in their power to commit frauds, and frequently do so, by means whereof several persons (who through many years industry in their trades and employments, and by great frugality, have been enabled to purchase lands, or to lend moneys on land security) have been undone in their purchases and mortgages, by prior and secret conveyances, and fraudulent encumbrances, and not only themselves, but their whole families thereby utterly ruined: for remedy whereof, may it please your most excellent Majesty (at the humble request of the justices of the peace, gentlemen, and freeholders of the county of Middlesex) that it may be enacted, and be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons in this present Parliament assembled, and by the authority of the same, That a memorial of all deeds and conveyances, which from and after the twenty-ninth day of September, in the year of our Lord one thousand seven hundred and nine, shall be made and executed, and of all wills and devises in writing made or to be made and published, where the devisor or testatrix shall die after the said twenty-ninth day of September, of or concerning, and whereby any honors, manors, lands, tenements, or hereditaments in the said county, may be any way affected in law or equity, may be registered in such manner as is hereinafter directed; and that every such deed or conveyance that shall at any time after the said twenty-ninth day of September, be made and executed, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial thereof be registered as by this Act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim; and that every such devise by will shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such will be registered at such times and in manner as is hereinafter directed.

. . . XVII. Provided always, and be it further enacted, That this Act shall not extend to any copyhold estates, or to any leases at a rack rent, or to any lease not exceeding one and twenty years, where the actual possession and occupation goeth along with the lease, or to any of the chambers in Serjeants Inn, the inns of court, or inns of Chancery; anything in this Act contained to the contrary thereof in any wise notwithstanding.

MASS. PUB. STS. c. 120, § 4. A conveyance of an estate in fee simple, fee tail, or for life, or a lease for more than seven years from the making thereof, shall not be valid as against any person other than the grantor or lessor and his heirs and devisees and persons having actual notice of it, unless it is recorded in the registry of deeds for the county or district in which the real estate to which it relates is situated.

§ 5. No deed shall be recorded unless there is indorsed upon or annexed to it a certificate, made as hereinafter provided, of its acknowledgment or of the proof of its due execution, and such certificate shall be recorded at length with the deed to which it relates; but this section shall not apply to conveyances from the United States.

N. Y. REV. STS. PART 2, c. 3, § 1. Every conveyance of real estate within this State hereafter made, shall be recorded in the office of the clerk of the county where such real estate shall be situated; and every such conveyance not so recorded shall be void as against any subsequent purchaser, in good faith and for a valuable consideration of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded.

§ 2. Different sets of books shall be provided, by the clerks of the several counties, for the recording of deeds and mortgages; in one of which sets all conveyances, absolute in their terms and not intended as mortgages, or as sureties in the nature of mortgages, shall be recorded; and in the other set, such mortgages and securities shall be recorded.

§ 3. Every deed conveying real estate, which by any other instrument in writing, shall appear to have been intended, only, as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage; and the person for whose benefit, such deed shall be made, shall not derive any advantage from the recording thereof, unless every writing operating as a defeasance of the same, or explanatory of its being designed to have the effect only of a mortgage, or conditional deed, be also recorded therewith, and at the same time.

§ 4. To entitle any conveyance hereafter made, to be recorded by any county clerk, it shall be acknowledged by the party or parties executing the same, or shall be proved by a subscribing witness thereto, before any one of the following officers. [The rest of the section is omitted.]

Penn. St. 28 May, 1715, § 8. No deed or mortgage, or defeasible deed in the nature of mortgages, hereafter to be made, shall be good or sufficient to convey or pass any freehold or inheritance, or to grant any estate therein for life or years, unless such deed be acknowledged or proved, and recorded (within six months after the date thereof,) where such lands lie, as hereinbefore directed for other deeds.

St. 18 March, 1775, § 1. All deeds and conveyances which, from after the publication hereof, shall be made and executed within this province, of or concerning any lands, tenements or hereditaments in this province, or whereby the same may be any way affected in law or equity, shall be acknowledged by one of the grantors or bargainors, or proved by one or more of the subscribing witnesses to such deed, before one of the judges of the Supreme Court, or before one of the justices of the Court of Common Pleas of the county where the lands conveyed lie, and shall be recorded in the office for recording of deeds in the county where such lands or hereditaments are lying and being, within six months after the execution of such deeds and conveyances; and every such deed and conveyance that shall, at any time after the publication hereof, be made and executed, and which shall not be proved and recorded as aforesaid, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such deed or conveyance be recorded as aforesaid, before the proving and recording of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim.[1]

St. March, 1820, § 1. All mortgages, or defeasible deeds in the nature of mortgages, made or to be made or executed for any lands, tenements or hereditaments within this commonwealth, shall have priority according to the date of recording the same, without regard to the time of making or executing such deeds; and it shall be the duty of the recorder to indorse the time upon the mortgages or defeasible deeds when left for record, and to number the same according to the time when they are left for record, and if two or more are left upon the same day, they shall have priority according to the time they are left at the office for record; and no mortgage or defeasible deed in the nature of a mortgage, shall be a lien, until such mortgage or defeasible deed shall have been recorded, or left for record as aforesaid: *Provided*, That no mortgage given for the purchase-money of the land so mortgaged, shall be affected by the passage of this Act, if the same be recorded within sixty days from the execution thereof.

Ill. Rev. Sts. (1874), c. 30, § 28. Deeds, mortgages, powers of attorney, and other instruments relating to or affecting the title to real estate in this State, shall be recorded in the county in which such real estate is situated; but if such county is not organized, then in

[1] § 2 provides that deeds made out of the State shall be recorded within twelve months.

the county to which such unorganized county is attached for judicial purposes.

§ 30. All deeds, mortgages, and other instruments of writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record.

§ 31. Deeds, mortgages and other instruments of writing relating to real estate shall be deemed, from the time of being filed for record, notice to subsequent purchasers and creditors, though not acknowledged or proven according to law; but the same shall not be read as evidence, unless their execution be proved in manner required by the rules of evidence applicable to such writings, so as to supply the defects of such acknowledgment or proof.

SECTION II.

REGISTRATION, HOW FAR NOTICE.

BEDFORD *v.* BACKHOUSE.

CHANCERY. 1730.

[*Reported* 2 *Eq. Cas. Ab.* 615, *pl.* 12.]

A. LENT money on a mortgage of lands in Middlesex, and the mortgage was duly registered. Afterwards B. lent money on the same security, and his mortgage was registered. Then A. advanced a further sum upon the same lands, without notice of the second mortgage. And it was held by LORD CHANCELLOR KING that the registry of the second mortgage was not constructive notice to the first mortgagee before his advancement of the latter sum, for though the Statute avoids deeds not registered as against *purchasers*, yet it gives no greater efficacy to deeds that are registered than they had before; and the constant rule of equity is, that if a *first* mortgagee lends a farther sum of money *without* notice of a second mortgage, his whole money shall be paid in the first place.[1]

[1] See *Morecock* v. *Dickins*, Amb. 678 (1768).

RUSSELL'S APPEAL.

SUPREME COURT OF PENNSYLVANIA. 1850.

[*Reported* 15 *Pa.* 319.]

THIS was an appeal from the decree of the Court of Common Pleas of Wayne County, making distribution of the proceeds of sale of real estate, sold at sheriff's sale as the property of H. D. Roberts.

Roberts, the defendant in the several judgments, and from the sale of whose real estate by the sheriff arose the moneys in controversy, purchased said real estate on the 11th day of April, 1846, of Caleb Dunn, by articles of agreement under seal, for the sum of $800. On the 1st day of May, 1847, Roberts had paid $463 on said contract. On the 1st day of December, 1848, there was a balance due and unpaid on said contract of $412.

On the 5th day of July, 1848, Roberts made the following assignment on the back of said contract, viz. : —

"For value received, I hereby assign all my right, and title, and interest in and to the above contract, to Stone & Graves and Moore and Graves, as collateral security for the amount due them, either on book, or note, or otherwise, said amount to be ascertained hereafter as soon as practicable. H. D. ROBERTS.

"DAMASCUS, *July 5th*, 1848."

H. D. Roberts took possession of the premises under the article of agreement, April 11th, 1846, and continued in possession and was in possession on the 30th day of November, 1849, the day of the hearing before the auditor.

On the 19th day of August, 1848, A. H. Russell obtained a judgment against said H. D. Roberts in the Court of Common Pleas of Wayne County, entered to No. 207, September Term 1848, for the sum of $275. Interest from same date, and which judgment, with the interest and costs thereon, amounted to $324.88¾, on the day said real estate was sold.

On the 9th day of September, 1848, John McGowan obtained a judgment in same court against H. D. Roberts, entered to No. 265, same term, for the sum of $156.99. Interest from same day.

On the 1st day of December, 1848, the contract was given up to Graves, absolutely, by parol agreement. Same day, Caleb Dunn and wife conveyed by deed said land to C. C. Graves: consideration mentioned in deed, $900.

December 4th, 1848, C. C. Graves and wife conveyed by deed same land to H. D. Roberts, consideration mentioned in deed, $900. Same day Roberts gave Graves a judgment for $800, which was entered same day to No. 102, December Term 1848, which, with interest and

cost, amounted to $837.42 on the day said real estate was sold. The note on which this judgment was entered, among other things, stated, "it being for the purchase-money of real estate."

On the 13th day of August, 1849, the sheriff sold said real estate as the property of H. D. Roberts, to C. C. Graves, for the sum of $865, on a *venditioni exponas* issued on the judgment of *A. H. Russell* v. *H. D. Roberts.*

An auditor was appointed by said court to distribute said moneys. Graves, Russell, and McGowan, in person or by attorney, appeared before the auditor and severally claimed the amount of their judgments out of said moneys.

The auditor applied $837.42 of said moneys to the payment in full of C. C. Graves's judgment, and $3.71 to Russell's, and balance to auditor's fees.

A. H. Russell and John McGowan excepted to the report, and claimed the amount of their several judgments from said moneys — McGowan claiming to come in upon said fund after Russell.

The court confirmed the auditor's report.

Exception was taken to the decree of confirmation and application of the money in dispute.

The case was argued by *Crane* and *Dimmick*, for Russell, and by *Mallery*, for appellee. *Miner* was for McGowan. *Waller* was for Graves and others.

The opinion of the court was delivered March 24, 1851, by

Coulter, J. Roberts, the defendant, as whose estate the land was sold, purchased it by articles of agreement, dated 11th April, 1846, for $800, of which he paid $463, went into possession, and remained in possession until the sale and distribution of the money below. Roberts became embarrassed with debts, and on the 5th July, 1848, he executed to Stone & Graves and Graves & Moore an assignment of the contract with Dunn under which he held the land, and all his right and title thereby acquired, as collateral security for the amount due them.

This assignment was never recorded, and Roberts still remained in possession. On the 19th August, 1848, after the unrecorded assignment, Russell obtained his judgment, and on the 9th September following, McGowan obtained his judgment. These two judgments claim the money produced by the sale, according to their priority. But on the 1st December, 1848, Roberts, by parol, surrendered the land to Graves, one of the assignees; and on the same day, Dunn and wife conveyed to C. C. Graves, consideration mentioned in deed, $900. On the 4th December, 1848, Graves and wife conveyed to H. D. Roberts, the defendant, who gave a judgment note to Graves for $800, which was immediately entered up.

To this last judgment the court below awarded the whole money made by the sale on Russell's judgment. It was contended by Russell and McGowan that they were entitled to the whole fund, because the note given by Russell falsely and fraudulently recited that it was for

the purchase-money. But it is well enough to deliver the case at once from this argument, because these judgments could only bind the equity, if it bound anything, which was in Roberts at the time they were obtained, that is, after the assignment to Graves & Moore. The stream cannot rise above the fountain. And the balance of purchase-money then due was a previous, valid, subsisting lien. The shuffling between Dunn, Roberts, and Graves cannot give to Russell and McGowan more than they were entitled to, nor deprive Dunn or his representative of that to which he had a lawful claim.

The real question then is, whether the judgments of Russell and McGowan bound the equity which Roberts had in the land at the time of the assignment to Graves & Moore? And that will depend upon the effect of that assignment. It was not an absolute sale or transfer of the equity, because it is expressed on its face to be a collateral security for the payment of a debt. It was, therefore, at most, nothing more than a mortgage. Even, although a conveyance be absolute in its terms, if it is intended by the parties to be a mere security for the payment of a debt, it is a mortgage: 6 Watts, 409, *Keene* v. *Gilmore*; and *Clark* v. *Henry*, 2 Cowen, 324; 7 Johnson's Chancery, 40, *Henry* v. *Davis*. Roberts still continued the debtor of Graves & Moore. The debt was not extinguished; it was, therefore, a mortgage. Nor has the writing the distinctive marks of a conditional sale, for the same reason, to wit, that the original debt was by the face of the papers till subsisting. But it was never recorded, and, therefore, must be postponed to a subsequent judgment: *Jaques* v. *Weeks*, 7 Watts, 261; and 17 Ser. & R. 70; and Statute 28th March, 1820, Dunlop, p. 354, second edition. It is contended, however, that the contract for the conveyance of the land to Roberts was but a chose in action, and that the assignment passed the title, without the necessity of recording: that it is not within the recording Acts; and *Craft* v. *Webster*, 4 Rawle, and *Mott* v. *Clark*, 9 Barr, were cited. But these cases do not carry the defendant in error through. An article of agreement for the sale of land, accompanied by delivery of possession and payment of part of the purchase-money, is much more than a chose in action; it is an abiding interest in the land itself. It may be bound by judgment; is the subject of judicial sale, not as a chattel, but as an interest in the land. In the early history of Pennsylvania, improvement rights were considered as chattels. But that time has long passed, and pre-emption or inchoate interests are bound by judgments and sold, because every interest arising out of real estate, equitable as well as legal, is considered as an interest in the land. Thousands of acres are held in this commonwealth by location and survey only. It would sound strangely to a lawyer of the interior to say that these interests were not real estate, and the transfer or encumbrance of them not subject to the recording laws. Such a doctrine would upset estates and change the accepted principles of the commonwealth. They have from ancient time been dealt with by the people

as interest in real estate, like other equitable interests in land; and, being the subject of contract and sale as such, there is the same reason for their being subject to the recording Acts as the legal title. The experienced and learned counsel states that he has been unable to find any reported case in which such equities were adjudged to be the subject of the recording Acts. But it may never before have been drawn in question. I know very well, and I think every practitioner is acquainted with the fact, that mortgages are often given upon equitable estates, and that equitable estates are often the subject of bargain and sale; and I may say, that I don't recollect to have seen it contended in any case that the recording Acts applied only to strictly legal titles, or that judgments were liens or attached only upon legal estates. The subsequent judgments, therefore, became liens at the time of their entry upon the equitable interest of Roberts, the assignment to Graves & Moore being merely a mortgage or security for a debt, and therefore, not being recorded, must give way to the subsequent judgments.

The decree is therefore reversed, and it is modified, so as to award to the legal title, or those representing it, so much of the money or fund in court as was due for balance of purchase-money by Roberts at the time Russell obtained his judgment; and the residue is awarded to Russell's judgment, unless the residue will more than satisfy it; and, in such case, what remains is awarded to McGowan's judgment.

The record is remitted to the court below for the purpose of carrying out this modified decree.[1]

SECTION III.

UNAUTHORIZED REGISTRATION.

HEISTER *v.* FORTNER.

SUPREME COURT OF PENNSYLVANIA. 1809.

[*Reported* 2 *Binn.* 40.]

IN this action of ejectment, a verdict was entered by consent for the plaintiff in the Circuit Court of Northumberland County, subject to the opinion of this court upon a case which stated in substance as follows: —

The title in fee of the lands for which the ejectment was brought, was in Thomas Rees on the 28th April, 1788. On that day, Thomas Rees of Montgomery County, and Hannah his wife, in consideration that Rees was indebted to Charles Massey, Christopher Marshall, and others, in several sums of money which he was unable to pay, and also in consideration of five shillings, conveyed to Charles Massey, Chris-

[1] Cf. *Putnam* v. *Story*, 132 Mass. 205 (1862).

topher Marshall, Israel Jacobs, and others, their heirs, &c., all and singular his lands, &c.; upon trust to sell the same in such convenient time as should seem meet to them, and to apply the money arising therefrom to the payment of all the just debts payable by Rees, to such creditors as should sign and agree to certain conditions in a certain instrument contained; the surplus money to be for the grantor after paying all debts.

This indenture contained a reservation to Rees of full power and perfect liberty to enter upon, occupy, and enjoy all or any part of the said lots, lands, &c. situate in the county of Northumberland, and to take and receive the yearly rents, issues, and profits thereof, for and during the term of four years from the 1st of April, 1788; and also in his own name, or in the name or names of his said trustees, or the survivor or survivors of them, at his own cost, to prosecute suits for the recovery of all or any of the said lands, &c., within the said four years, as fully and absolutely as if the assignment had never existed. The grantees, at the same time, were at liberty to sell all or any of the lands in Northumberland County within the four years, notwithstanding the above reservation.

On the same day the deed was acknowledged before Frederick A. Muhlenberg, a justice of the Court of Common Pleas for Montgomery County; and on the 26th February, 1790, it was recorded in Northumberland County.

On the 29th April, 1788, Israel Jacobs and others, twenty in number, creditors of Thomas Rees, recognizing the above-stated indenture, in consideration thereof did agree to suspend all demands against Thomas Rees for four years from the 1st of April, 1788, yet not so as to debar them from demanding a dividend of such money as should come to the hands of the trustees within that period; they also released to Rees his household furniture, and ratified and confirmed the agreement made by the trustees with Rees.

On the 25th March, 1789, Abraham Weitner obtained a judgment in Montgomery County against Thomas Rees and another, in an action of debt instituted to December Term, 1787.

On the 15th March, 1792, Weitner, by an instrument of that date, recognized the deed of Thomas Rees of 28th April, 1788, and also the deed of the 29th April, 1788, and bound himself, his heirs, &c. to abide by the conditions of the last-mentioned deed, in consideration of the former, as fully as if he had executed the same.

A *scire facias* upon the judgment obtained by Weitner in March, 1789, was issued by his executors, returnable to February Term, 1796, in Montgomery County, to which the sheriff returned "*nihil*." On the 9th February, 1796, a judgment *nisi* was entered for the plaintiffs. A *testatum fi. fa.* issued to Northumberland County, returnable to August, 1797, upon which there was no return of a levy and condemnation, although both were made. A *testatum venditioni exponas* then issued to November, 1797, and upon this writ the land in question

was sold by the sheriff to Gabriel Heister, the lessor of the plaintiff, and a deed made accordingly.

If this court should be of opinion in favor of the plaintiff, judgment to be entered for him in the Circuit Court *nunc pro tunc;* but if in favor of the defendant, then in the same manner a nonsuit to be entered.

The case was argued at July Term, 1808, by *Duncan* on the part of the plaintiffs, and by *D. Smith* and *Watts* for the defendant; and was held under advisement until this day, when the judges delivered their opinions.

The Chief Justice did not sit upon the argument, having been of counsel with the defendant.

YEATES, J. The first question which presents itself for consideration in this case, is, whether the deed of assignment from Thomas Rees and wife to Charles Massey and others, dated 28th April, 1789, not being recorded in Northumberland County within six months from its date, is not merely void to all intents and purposes, except as between him and his trustees?

This depends upon the words of the 8th section of the Act, "for acknowledging and recording of deeds," passed in 1715 (1 St. Laws, 112), which are as follows: "No deed or mortgage, or defeasible deed in the nature of mortgages, hereafter to be made, shall be good or sufficient to convey or pass any freehold or inheritance, or to grant any estate therein for life or years, unless such deed be acknowledged, proved, and recorded, within six months after the date thereof, where such lands lie, as hereinbefore directed for other deeds." It has been contended that this is a *defeasible* deed; because, if Rees, or any one in his behalf, had paid the debts intended to be secured thereby, or if part of the lands conveyed had been found sufficient for those purposes, equity would have decreed a reconveyance to Rees, and of course in our State the uses would have inured to his benefit. It is said, that the section under consideration is similar to sec. 1 of the Statute 27 Hen. 8, *c.* 16, the words of which are, "That no manors, lands, &c., shall pass, alter, or change from one to another, whereby any estate of inheritance or freehold shall be made or take effect, &c. except the same bargain and sale be made by writing indented, sealed, and enrolled, &c., within six months next after the date of the same writings indented, &c." Under this Statute it has been resolved (2 Inst. 671, Cro. Jac. 408, Cro. Car. 110, 216, 569), that no estate passes until the deed be enrolled; but when enrolled, it relates to the time of its execution, if no act has been done to prevent it. But it has never been considered under the recording Act of 1715, that *all* deeds were to be recorded within six months, the words "in the nature of mortgages" in the plural number, being construed to relate to all the preceding words in the sentence; and the point has been so adjudged in this court upon argument. Assuming this then as the true construction of the law, the only question is, whether this be a

mortgage for securing the payment of money, within the intention of the Act, or an *absolute* conveyance. It is certain that the debts due to the creditors formed the consideration of the deed, and with the nominal sum of five shillings, is so expressed therein; but it is also clear, that the trustees were vested with the complete legal estate, and were empowered to sell all or any of the lands in Northumberland County, in such convenient time as to them should seem meet, either by public or private sale, without the control or interference of the grantor.

I fully admit the maxim, "Once a mortgage, always a mortgage" (1 Vern. 8, 33, 190, 488; 1 Wms. 268), and that every mortgage is a conditional sale (3 Wms. 9; 1 East, 295; 1 H. Bl. 119). But mortgages are distinguished from defeasible purchases subject to a repurchase (Pow. on Mort. 34, 50, 156, 301, 302). In this government, where a mortgagee would recover the money due to him, after default made by the mortgagor, the old Act of 1705, "for taking lands in execution for payment of debts," prescribes the mode of recovery by suing out a *scire facias*, "after the expiration of twelve months next ensuing the last day whereon the mortgage money ought to be paid, or other conditions performed," and then proceeding upon the judgment by *levari facias*. It will not be pretended, that proceedings of this kind could regularly be had upon the deed under consideration, or that the trustees could not proceed to a sale of the premises conveyed, without the instrumentality of a court of record; and thinking as I do that mortgages recoverable under the provisions of the former Act of 1705 are alone comprehended by the 8th section of the recording Act of 1715, I am of opinion, that the not recording of this deed in the proper county within *six months* from its date, does not affect its binding force.

The second question is, whether the recording of this deed upon the 26th February, 1790, operates as constructive notice of its contents, to the lessor of the plaintiff in the present ejectment.

The deed was acknowledged on the 29th April, 1788, by Rees and his wife, before Frederick Augustus Muhlenberg, Esquire, one of the justices of the Court of Common Pleas of Montgomery County, at which time no law of the State authorized such acknowledgment where the lands lie in a different county, nor was the recorder of Northumberland County authorized to place the same on record in February, 1790. It is in vain to say that the law will presume the judicial officer to have competent authority, when it clearly appears to us by his style of office, that he had no such legal power. I by no means think that the doctrine of constructive notice should be extended beyond its settled limits. Lord Chancellor Redesdale in *Lord Dunsany* v. *Latouche*, 1 Scho. & Lef. 157, has said that if a deed in Ireland be *unduly* registered, it gains no preference thereby; and though his doctrine in that case has been affected by a subsequent decision in the Court of Exchequer (1 Scho. & Lef. 463), I do not find that his observation in this particular has been questioned. The same thing is asserted by Mr.

Sugden. He observes, It would seem that the courts might hold, without any violation of principle, that a purchaser should not be deemed to have notice of an equitable encumbrance, by the mere registry of it, unless it was duly registered (Sugden, 470). But the very point has been determined in the Supreme Court of the United States in 1805, in *Hodgson* v. *Butts*, 3 Cranch, 155, on error to the Circuit Court for the District of Columbia, that a mortgage of chattels in Virginia, not acknowledged or proved by the oaths of three witnesses, according to the laws of that State, though recorded, was void as against creditors and subsequent purchasers. A case, similar in principle, came before Judge Brackenridge and myself at a Circuit Court in Lewis Town, in May, 1801, between the lessee of Joseph Simon and William Brown. There the plaintiff claimed the lands in controversy under an application in the name of Robert Semple, assigned to Jos. Simon on the 18th January, 1769. The defendant claimed under the same application, which was assigned to William Plunket on the 3d May, 1782. To show a constructive notice to the defendant of this previous assignment to Simon, the certificate of its being recorded in Cumberland County, on the 26th March, 1789, was offered in evidence. This defendant held under Henry Drinker, who had purchased from John Thornbrugh, on the 28th April, 1795. The assignment to Simon was recorded on the oath of Solomon Etting, before Robert Maxwell, Esquire, then president of the Court of Common Pleas of Franklin County, that Semple had acknowledged the assignment to be his act and deed, and that certain persons were the subscribing witnesses thereto. The court held that the affidavit was informal and illegal, and did not authorize the recording of the assignment; it was no evidence whatever of notice to the defendant, and could not be received as such.

Upon these authorities, I hold that the lessor of the plaintiff cannot legally be said to have had constructive notice of the deed to the trustees, though placed on record by them, without having taken the necessary preliminary steps for that purpose.

The remaining question is, whether a court of equity, under all the circumstances of this case, would afford relief to the trustees.

It has been strongly urged on the part of the defendant that a judgment creditor is not within the meaning of the supplement to the Act for acknowledging and proving of deeds, passed on the 18th March, 1775, 1 St. Laws, 703: that the original judgment of Weitner in Montgomery County was no encumbrance on the lands which lie in Northumberland County, and that the judgment on the *scire facias* was a mere nullity, being founded on one *nihil* returned, nor could it have been served either on Rees or the terretenants, who lived out of the bailiwick of the sheriff, and consequently the judgment entered thereon was radically defective, being without notice; that this procedure of Weitner was in direct violation of his plighted faith, and fraudulent as to the other creditors of Rees, and therefore could confer no right; that if the trustees had known of the levy or sale of the lands, they

could readily have obtained the sale of the lands to be set aside, as well on the ground of irregularity in not serving the *scire facias*, as of Weitner's written engagement; and that this being the first opportunity afforded them of contesting the matter, it should be taken *nunc pro tunc*; that this is substantially the same case as if the sheriff had levied on the lands of a stranger, whose deed had not been regularly recorded, because, as to Weitner, the lands were no longer subject to his execution, nor could he levy on them against his own stipulation; and that under the 4th section of the aforesaid Act of 1705 the sheriff's vendee is to hold the land for such estate, as the debtor himself might, could, or ought to do, at or before the taking the same in execution.

These arguments have some force, but more plausibility. They are, however, entitled to distinct answers, if such can be given. Unquestionably it is a case of hardship on either side; and where the loss shall be thrown, on solid legal principles, conducive of permanence to land titles and to the public security, is the great object of inquiry.

I freely concede that a judgment creditor is not to be considered as a purchaser or mortgagee, within the words or spirit of the supplement to the recording Act, passed on the 18th March, 1775. Neither the preamble, enacting clause, nor exception embraces the case of a judgment creditor; and if the Legislature had meant to include such creditors, they would have so declared themselves in clear and unequivocal terms. This point was determined by Judge Smith and myself, at a Circuit Court held in Fayette County, in October, 1804, between the Lessee of James Rogers and John Gibson and others. Money, which is advanced on a mortgage, is parted with on the security of the lands; but a man is as often trusted on the security of his person and effects, as of his lands. But a *purchaser* under a judgment stands on a very different footing from the *plaintiff* in that action.

I likewise agree that the judgment on the *scire facias* in Montgomery County was wholly irregular, and that the court from which the process issued would without hesitation have set aside the sale on both of the grounds alleged, if application had been made to them previous to the acknowledgment of the sheriff's deed. The judgment also would have been reversed on error. Nevertheless, under the last section of the aforementioned Act of 1705, "if the judgment had been reversed for error, the lands could not be returned, nor the sheriff's sale thereof be avoided, but restitution only should in such cases be made of the money or price for which the lands were sold." This is strictly agreeable to the principles of the common law, in case of the sale of a term for years in England, in order that sales by sheriffs may not be defeated (8 Co. 96 b, 143 a; 1 Vez. 195, 196), provided the sale has been to a stranger (Dy. 363 a; Yelv. 180; 2 Leon. 92; 5 Co. 90; Jenk. 264; Cro. El. 278). The justice and regularity of the proceedings of one tribunal can only be re-examined in a superior court, and cannot be reviewed or corrected by another tribunal *collaterally* in another suit.

But if Weitner or his executors had become the purchasers at the sheriff's sale, the trustees might have taken advantage of the illegality of their proceedings, and of the fraud practised by him or them on the other creditors. Express notice also of the deed made to the trustees would be brought home to him by his written recognition thereof. It is the great prominent feature of this case, that neither direct nor implied notice of the assignment can be imputed to the lessor of the plaintiff. He was therefore a *bona fide* purchaser, and paid his money, confiding in the judgment of a court of competent jurisdiction, under a fair sale, and is entitled to protection under the words and spirit of the Act of 18th March, 1775. Having the legal estate in him, a Court of Chancery, between two equities, would not interpose to his disadvantage, but where the loss has happened, there would it be permitted to continue. It falls within the common rule, that where, of two persons equally innocent or equally blamable, one must suffer, the loss shall be left with him on whom it has fallen. Where there is equal equity, it is fully settled, the law must prevail. It has been decreed, that the registering of an equitable mortgage in Middlesex is not presumptive notice of itself to a subsequent legal mortgagee, so as to take from him his legal advantage (Ambler, 678). And I may be permitted to repeat what Sir Joseph Jekyll said upon another occasion (2 Eq. Cas. Abr. 609, pl. 7), that under the special circumstances of this case, though Mr. Heister might have searched the records of Northumberland County, yet he was not bound to do it, when the insertion of the deed on the record was wholly unauthorized.

When it is objected here that the plaintiff can only succeed to the rights of Weitner, and can take no larger estate than Rees held at the time of the lands being levied, it must be remembered, that the judgment on the *scire facias*, and the executions issued thereon, were not merely void but voidable, and that Heister remains uninfected with the slightest species of fraud, and an entire stranger to all the proceedings between the original parties. It will not be questioned, if Rees had sold these lands to an innocent stranger, who had acted with the most perfect good faith throughout the whole transaction, and had obtained the registry of his deed before the assignment had been duly recorded in the only manner known to the law, that such vendee would have been within the plain words and meaning of the supplement to the recording Act. Now, to Weitner and his executors, the plaintiff is wholly a stranger, and whatever right or interest Rees could legally convey, the sheriff might levy on and sell, and his vendee coming in by act of law, would be entitled thereto. He cannot possibly be in a worse situation than if Rees had sold and conveyed, on the contrary, he might justly claim every preference which the policy of the law confers on purchasers at sales made by the officers of justice. Lord Hardwicke has said (1 Vez. 123) that the rule is right, that whoever takes the assignment of a bond, being a chose in action, takes it subject to all the equity in the hands of the original obligee;

but length of time and circumstances may vary that, and make the case of the assignee stronger.

For these reasons, I am of opinion, that however unworthy the conduct of Weitner's executors may have been (and it surely merits great reprehension, and will be viewed by every honest man with much indignation, if they really knew the facts), however irregular their proceedings, and however hard the case may bear on the creditors in general, the trustees can impute their loss solely to their own mistakes and negligence, and that their only remedy is either by writ of error on the judgment in Montgomery County, or by suit against the legal representatives of Weitner for their gross misconduct. On the whole, I am abundantly satisfied that judgment should be entered for the plaintiff.

BRACKENRIDGE, J. In this case the title is admitted to have been in Thomas Rees, on the 28th April, 1788. This title is alleged to be derived to the lessor of the plaintiff, through a judgment in favor of Abraham Weitner against Rees, on the 28th March, 1789, in Montgomery County, upon which the executors of Weitner obtained judgment on *scire facias*, the 9th February, 1796; a *testatum fi. fa.* to Northumberland, issued upon this judgment, returnable to August, 1797, and a *testatum vend. exp.* to November, 1797, upon which the lands in question were sold to Heister by the sheriff, who made this return to the *venditioni*, and executed a deed accordingly.

The alleged defect in this derivation, as vesting the interest of the debtor in the purchaser, is an alleged irregularity in the proceedings under which the sale was made. No returns appear on the record of the *testatum*, of a levy on the property sold, so as to ground a *venditioni exponas* on which the sale was made. But the proper time for the debtor, or those who have an interest in him, to have availed themselves of this defect, was before the deed was made by the sheriff, or acknowledged in court. This and the like objections come forward properly at that stage. But even on a writ of error, supposing this irregularity to be such error as would avoid the sale, a debtor who had not availed himself of it at the proper stage, would not be relieved against the sale, even at common law, where a stranger was the purchaser. *Goodyer* v. *Junce*, 1 Yelv. 179, no return made to ground a *testatum*, yet execution. It shall be presumed there was such writ, and if sale has been made to a stranger, yet upon the reversal the debtor shall not have his term again; for it is the party's folly he does not pay the judgment, and if such a sale should be avoided no one would buy goods of the sheriff, whereby many executions would fail.

The title of plaintiff is also resisted by what is alleged to be a title derived from the debtor Rees, prior to the lien under which the plaintiff derives title, that is, the attaching of the judgment under which the sale was made; in fact, before even the judgment was entered on which the *testatum* issued, which alone could attach upon the lands in question. This was by a conveyance from the debtor. The first

question which arises must respect the nature of this conveyance. If absolute, and for a valuable consideration, and *bona fide*, transferring the property, it takes place of the judgment or *testatum fi. fa.* under it, for it is prior. But the consideration was the discharge of the grantor's debts, except as to the nominal sum of 5*s.*; and though creditors are the grantees, yet they are in fact but trustees for this purpose, and by the special provision of the conveyance, only for such of the creditors as should sign and agree to certain conditions in a certain instrument, *the surplus money to be for the grantor after paying all debts.* This must mean the debts of such creditors as should sign and agree as aforesaid; or taking it to mean all debts of all creditors, and the grant to be for this object, yet it is "reserving to the grantor full power and perfect liberty to enter upon, occupy, and enjoy all or any part of the said lots and lands, situated in the county of Northumberland, and to take and receive the yearly rents, issues, and profits thereof for and during the term of four years, the grantees to be at liberty to sell any of the lands in Northumberland County within the four years, notwithstanding the above reservation." The land in question was in the county of Northumberland.

This grant was good against the grantor, and defeasible only by satisfying the object of the grant. But by so doing, it was as much defeasible as a mortgage. A sale made in pursuance of the trust would be good; but the grantor must be considered as having an equitable right to supersede all execution of the trust by satisfying the object of it. Where an estate is conveyed to trustees, upon trust to sell and pay debts, &c., and to pay the surplus of the moneys to arise by sale to the grantor, the debt of the judgment creditor can only, it should seem, affect the surplus moneys in the hands of the trustees, and is not *a lien on the estate itself.* Sugden's Law of Vendors, 305. But no sale here had taken place prior to the levy or sale under the judgment; so that the case of a *purchaser under the trustee does not intervene.* But this grant, though good against the grantor or judgment creditor to this extent, cannot farther affect creditors who do not choose to accede to the instrument. As to them it is void; for in the words of the Statute 13 Eliz. *c.* 5, it may be *to the let or hindrance of the due course and execution of law and justice,* and as against such persons whose actions, suits, debts, accounts, &c., might be in any wise *disturbed, hindered, or delayed*, it is void, frustrate, and of no effect." Even with personal notice of this deed therefore, I take it the debt before due and owing, and contracted on the credit of this fund, as must be presumed, could not be affected by this grant, in proceeding to recovery.

In this view of the case, it might not be necessary for me to consider the effect of the registry of this conveyance as giving notice of it, the duly registering being questioned on the ground that it had not been proved according to the requisites of the registering Act. Nevertheless, having an opinion, I may express it, which is, that it would

not seem to have been so proved as to warrant the registering in the county of Northumberland; and taking that to be so, I have no hesitation in saying that it could not be notice. This if notice, is constructively so; and the law cannot construe that as having an effect which is not brought within its requisites. It is on this ground that it cannot give priority; and how then shall it operate as notice, which is the principle on which priority is given? This was my way of thinking at the argument; since which I find in the books a confirmation of my opinion. For though it is thrown out by the Chancellor Redesdale, *that if registry be notice, it must be notice whether duly registered or not;* Schoales and Lefroy, 157; yet we have this *dictum* adverted to in Sugden's Law of Vendors, 470, with the author's comment, "that this is assuming what has never been decided; and it should seem that the courts might hold, without any violation of principle, that a purchaser should not be deemed to have notice of an equitable encumbrance by the mere registry of it, *unless it was duly registered.* Why should equity interfere in favor of an encumbrancer, when he has not complied with the salutary requisitions of that very Act upon which he lays his foundation for relief?" To apply this to the deed in question, it is taking it to be but an equitable conveyance; but the reasoning is the same where the contest, as it is alleged in this case to be, is between a prior and subsequent absolute conveyance. Why should the law interfere in favor of a purchaser, to *construe notice* by a registry which has not been made according to the requisites of the registering Act?

But we come now to the main strength of the case on behalf of the defendant. The judgment creditor under whom the plaintiff claims, Abraham Weitner, did by his deed recognize the deed of Rees, and also another deed of other creditors recognizing the deed of Rees; and therefore it cannot be in his mouth to say that he is *letten, hindered*, or *delayed* in his execution; and the conveyance in question bars any right derived to him under his judgment, thus proceeded upon contrary to his agreement. But who is it that shall set up this bar against him? Thomas Rees the debtor, or those who come in under him by virtue of these trust deeds, so given or acceded to? Shall they be permitted to set this up against a purchaser under Thomas Rees the debtor? Will it not be an answer from a purchaser to say, You suffered this judgment to stand on the record without an entry of satisfaction or stay, and what is more, this deed of Weitner is not recorded duly or unduly. I have had no notice of it, actual or constructive. I have been led to lay out my money by this appearance of an existing judgment, and proceeding under it; and whether by the fraud of the judgment creditor, or the want of information on the part of his executors, the negligence of the debtor or his grantees, it ought not to work me an injury. It is contrary to the policy of the law in supporting sheriffs' sales, which might have been set aside on motion, or reversed by writ of error. In this view of the case, a purchaser is

in a better situation than a judgment creditor himself. For the want of notice will protect him, while the privity of the judgment creditor to the transaction takes that away.

As to a judgment creditor not being a purchaser, strictly speaking he is not so. His lien approaches him to the character of a mortgagee. One cannot call a judgment creditor a purchaser; all that he has by the judgment is a lien upon the land. 2 Peere Wms. 491. But "the Statute of Elizabeth expressly extends to charges upon the land; for the words are 'shall or do bargain, &c. or *charge the same lands*,' and charges upon, as well as charges *out* of the land seem within their natural import. It is true the conusee of a Statute or recognizance has, in strict legal language, no charge upon the land; he has neither a right in nor a right to the land; and if he release his right in or to the land, he may nevertheless extend it if he choose. But yet in common intendment, Statutes and recognizances are charges upon the land, and they have been so called in courts of law; and it would have been too much to circumscribe the operation of a law for the prevention of frauds by insisting on such technical formalities. In *Garth* v. *Estfield*, it was said, that though the Statute did not expressly speak of conusees, it should be expounded to extend to them, for the Statute had always *received an equitable construction to relieve purchasers.*" Roberts on Fraudulent Convey., 392. The purchaser at sheriff's sale is a purchaser, and protected under want of notice like every other. The consequences would be monstrous, if the law would suffer him to be disturbed by the collusion and secret trust, or to be affected even by the culpable negligence of those who were under a moral and legal obligation to do something which would save others from laying out their money without consideration. The policy of the law to obviate fraud is against it. I concur in the argument of counsel on one side in this case, that even had the debt been paid by Rees or by his trustees to the judgment creditor, or had an agreement in writing been made but not filed, or a release not put upon record, this would not affect an innocent purchaser under the outstanding judgment. There will be a loss in this case, provided the estate of Rees should prove insolvent; and it comes to this, whether it shall fall upon creditors who have gone out of the ordinary course, by an arrangement with the debtor, however founded in humanity to him and a spirit of equal justice to other creditors, yet who have not conducted the arrangement in such a manner as to save purchasers from laying out their money on the property which was the subject of the arrangement. This I admit is taking it as established, that the conveyance to the trustees in the first instance did not absolutely divest the property out of the debtor; or, that the not duly recording it as against other creditors avoided it. For otherwise, whatever might become of the judgment of Weitner, the land conveyed would be out of the reach of the lien of it. And I am aware that the considering these conveyances in this point of view, is in the way of almost any arrangement that a

debtor possibly can make for a *pro rata* payment of his debts, where he is indebted to several, short of a consent of the whole of his creditors, and contrary to the policy of the Statutes of bankruptcy in this particular, and of Insolvent Acts; but I think it better that the arrangement should be left to the positive regulations of Statute, or to the ordinary course of law, than that an opening should be given, by an arrangement of the debtor's own, to collusion and fraud. If a debtor wishes to give property in discharge of what he owes, let him transfer it absolutely, individually according to their debts, or to one for the use of the whole, as the law does in the cases of bankruptcy or insolvency; and not as here, for the use of such as shall sign and agree to certain conditions, or to cut and carve for himself as to use and occupation and perception of profits, and bringing suits in his own name or in that of his trustees. This is inconsistent with a fair and *bona fide* parting with the property, and in the nature of the disposition, and most generally in the intention of it, is but a cover for fraud, and a reservation of interest for the debtor himself. From all the experience I have had, it takes place in the case of shuffling debtors, who have contracted debts without an honest intention of discharging them, and have put off the payment, with a view to save something in the confusion of appropriation. If a man must fail, let him call his creditors, and leave the disposition to their consent, or, where they cannot agree, to the ordinary disposition of the law; it is in vain for him to attempt to continue a sort of ownership; and it is unreasonable, where his situation raises a presumption that his conduct has not been at least prudent, in the management he has already had of his affairs. I have a strong leaning against everything of this kind, and think it best that it be left to the law to settle a man's affairs, when they have become so embarrassed that it must be evident he has not been provident himself, than that we should hear of his taking care of his creditors by deeds of trust, not having the fair open and general consent of the whole of the creditors. It is better that he should be suffered to prefer individual creditors, than that the least countenance should be given to ways and means of defrauding all.

On these grounds, I am of opinion for the plaintiff.[1]

Judgment for plaintiff.

GRAVES *v.* GRAVES.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1856.

[*Reported* 6 *Gray*, 391.]

WRIT of entry to recover a tract of land in Whately and Deerfield. Plea, *nul disseisin*. At the trial in this court, both parties claimed title under Franklin Graves.

[1] Cf. *Carter* v. *Champion*, 8 Conn. 549 (1831).

It appeared that on the 25th of January 1854 Franklin Graves conveyed the premises to Josiah Allis by a warranty deed, and Allis at the same time executed to Franklin Graves a bond of defeasance for the reconveyance of the land upon payment of the sum of $1,600 in three years and interest annually, and for the possession of the land during the three years by the obligee, he paying the interest, taxes, and insurance.

The tenant gave in evidence an assignment, under seal, from Franklin Graves to the tenant, indorsed on said bond, and dated March 18th 1854, assigning "unto the said Erastus L. Graves, his executors, administrators, and assigns, the within written bond or obligation, and the sum of sixteen hundred dollars mentioned in the condition thereof, together with all interest due and to grow due for the same, and all my right, title, interest, claim, and demand whatsoever in and to the same, and all the right, title, and interest which the said bond gives me in said sum of money, or the land to which it relates." This assignment was not acknowledged before any magistrate, but was recorded in the registry of deeds.

The demandant claimed title under a subsequent attachment and levy of execution upon the land as the property of Franklin Graves; and contended that the assignment was ineffectual to convey any title in the land to the tenant, for the following reasons:

1st. Because it was uncertain in its terms, and therefore void; inasmuch as it was, in terms, not a mere transfer of the bond, but also a transfer of the sum of $1,600 mentioned therein, which was not a sum due to the obligee, but the mortgage debt which he was to pay to the obligor.

2d. Because, so far as its purpose could be ascertained, it was a mere assignment of the bond, as a contract or chose in action, and not of any interest in the land; the assignment not running to the assignee's heirs, and not being acknowledged, nor treated by the parties as a deed; and not purporting to convey the title which the assignor originally had, but only "all the right, title, and interest which the said bond gives me in the land to which it relates," which was no interest whatever; that, if the bond had been originally made to a third person, it would have given him no interest in the land, and an assignment of it to him had no greater effect.

3d. Because, as a deed, it was ineffectual, for want of acknowledgment, and of any legal record.

Dewey, J., being of opinion that, for some or all of these reasons, the assignment was insufficient to defeat the demandant's title under his attachment and levy of execution, took the case from the jury, and reserved the question for the full court, with an agreement that if the ruling was right, the tenant should be defaulted; if not, the case should stand for trial.

J. Wells, for the demandment, cited *Porter* v. *Millet*, 9 Mass. 101; *Rice* v. *Rice*, 4 Pick. 349; *Trull* v. *Skinner*, 17 Pick. 213; *Lovering* v. *Fogg*, 18 Pick. 540.

W. Griswold, for the tenant.

SHAW, C. J. It is very clear that the warranty deed from Franklin Graves to Allis, and the simultaneous bond to reconvey upon payment of a sum of money, constituted a mortgage to Allis, and left an equity of redemption in Franklin Graves.

The court are of opinion that the effect of the assignment of the instrument of defeasance by Franklin Graves to Erastus L. Graves, with all his right, title, and interest in the land therein described, constituted a conveyance of the equity of redemption.

But the instrument of defeasance, not being acknowledged, was improvidently admitted to registration, and the record does not operate as constructive notice of the execution of the assignment of the equity of redemption, as against an attaching creditor of the equity; and therefore the title of the attaching creditor, though subsequent in time, takes precedence of the assignment.

We think however that, under the circumstances, it is proper that the case should go to a new trial, to enable the defendant to prove, if he can, actual notice to the plaintiff of the prior assignment of the equity, when he made his attachment.[1]

New trial ordered.

SECTION IV.

ERRORS IN REGISTRATION.

FROST *v.* BEEKMAN.

NEW YORK COURT OF CHANCERY. 1814.

[*Reported* 1 *Johns. Ch.* 288.]

THE CHANCELLOR [KENT[2]]. . . . Another and a more interesting question, is respecting the extent and effect of the registry of the defendant's mortgage, as notice to purchasers. It was a mortgage for 3,000 dollars, and, by mistake, the registry was only for 300 dollars. This mistake is the whole cause of the controversy.

The Mortgage Act of the sess. 24 *ch.* 156, declared, among other things, that the registry of a mortgage should contain, not, indeed, the mortgage at large, but the essential parts of the mortgage, and among other specified parts, "the mortgage money, and the time, or times, when payable." To this register all persons whomsoever, at proper seasons, are at liberty to have recourse; and the Act declared that mortgages were to have preference, as to each other, according to the times of registry, and that "no mortgage should defeat or prejudice

[1] See *Blood* v. *Blood*, 23 Pick. 80, 84 (1839).

[2] Part only of the opinion is here given.

the title of any *bona fide* purchaser, unless the same should have been duly registered, as aforesaid." This registry is notice of the mortgage to all subsequent purchasers and mortgagees; and so the Act was construed, and the law declared, by the Court of Errors, in the case of *Johnson* v. *Stagg*, 2 Johns. Rep. 510. The English authorities on this point do not, therefore, govern the case. The language of those authorities, undoubtedly, is, that the registry is not notice, though that doctrine is much questioned, and the point seems still to be floating and unsettled. *Bedford* v. *Backhouse*, 3 Eq. Cas. Abr. 615, pl. 12; *Wrightson* v. *Hudson*, Ib. 609, pl. 7; *Morecock* v. *Dickins*, Amb. 678; *Latouche* v. *Dunsany*, 1 Schoale & Lefroy, 157; Sugden (3d Lond. ed.), 524–527; Com. Dig. tit. 32, Deed, ch. 21, s. 11. The only question with us is, when, and to what extent, is the registry notice? Is it notice of a mortgage unduly registered? or is it notice beyond the contents of the registry?

The true construction of the Act appears to be, that the registry is notice of the contents of it, and no more, and that the purchaser is not to be charged with notice of the contents of the mortgage, any further than they may be contained in the registry. The purchaser is not bound to attend to the correctness of the registry. It is the business of the mortgagee, and if a mistake occurs to his prejudice, the consequences of it lie between him and the clerk, and not between him and the *bona fide* purchaser. The Act, in providing that all persons might have recourse to the registry, intended *that* as the correct and sufficient source of information; and it would be a doctrine productive of immense mischief to oblige the purchaser to look, at his peril, to the contents of every mortgage, and to be bound by them, when different from the contents as declared in the registry. The registry might prove only a snare to the purchaser, and no person could be safe in his purchase, without hunting out and inspecting the original mortgage, a task of great toil and difficulty. I am satisfied that this was not the intention, as it certainly is not the sound policy, of the Statute; nor is it repugnant to the doctrine contained in the books, that notice to a purchaser, of the existence of a lease, is notice of its contents. *Taylor* v. *Stibbert*, 2 Ves. jun. 437; *Hiern* v. *Mill*, 13 Ves. jun. 118–120; *Hall* v. *Smith*, 14 Ves. jun. 426. In that case, the party is put upon inquiry, and he must make it, or abide the consequences. The decision, in *Jackson* v. *Neely*, 10 Johns. Rep. 374, was made upon the same principle; and it was held that the recital in a deed of a letter of attorney, by which it was made, was notice to the purchaser of the existence of such a power. But here the Statute did not mean to put the party upon further inquiry. The registry was intended to contain, within itself, all the knowledge of the mortgage requisite for the purchaser's safety.

The question does not necessarily arise, in this case, how far the unauthorized registry of a mortgage, as one made, for instance, without any previous legal proof, or acknowledgment, would charge a pur-

chaser with notice of the mortgage. The better opinion, in the books, seems to be, that it would not be notice, and that equity will not interfere in favor of an encumbrancer, when he has not seen that his mortgage was duly registered. Sugden's Law of Vend. 527; 1 Schoale & Lefroy, 157; *Heister* v. *Fortner*, 2 Binney, 40. But here everything was done that could have been previously required of the mortgagee. The mortgage was duly presented for registry, and he was not bound to inspect and correct the record. This was the exclusive business and duty of the clerk, and there is no reason why the registry should not operate as notice, to the amount of the sum mentioned therein; and, indeed, so far the obligation of the registry is admitted by the bill.

I conclude, therefore, that the registry was notice to purchasers, to the amount, and only to the amount, of the sum specified in the registry.[1]

Gold, for the plaintiffs.

Emott, contra.

CURTIS *v.* LYMAN.

SUPREME COURT OF VERMONT. 1852.

[*Reported* 24 *Vt.* 338.]

THE facts sufficiently appear in the opinion of the court, which was delivered by

HALL, J. This is an appeal from chancery. The bill is for the foreclosure of a mortgage in common form. The complainants are the mortgagees; one of the defendants, Edgerton, being the mortgagor, and another defendant, Lyman, being a purchaser under Edgerton.

The facts found and about which there is little or no controversy, are these: —

Edgerton being indebted to the plaintiffs by note in the sum of $2000, mortgaged to them certain lands, which mortgage was transcribed upon the book of records of the town on the 11th of June, 1835, and duly certified as recorded; but no reference to the record was entered upon the alphabet. Subsequently, the defendant Lyman,

[1] See s. c. on appeal, 18 Johns. 544 (1820).

"This question could never arise between a mortgagee and a subsequent judgment-creditor, for the plain reason, that such a creditor is not a purchaser, nor entitled to the privileges of that position.

"So far as the Statute goes, in giving him a preference over mortgages not perfected by a delivery to the recorder, his rights are absolute, but for everything else, he is remitted to general principles; and upon general principles, it is very clear that he acquires a lien only upon the interests of his debtor, and is bound to yield to every claim that could be successfully asserted against him." *Tousley* v. *Tousley*, 5 Ohio, St. 78, 87 (1855).

without actual notice of the mortgage, and before the record of it was alphabetted, for the consideration of $5000, purchased the same land of the mortgagor, his deed being recorded Feb. 7, 1839. Both the mortgage and deed were received for record and certified as recorded by Edgerton, the mortgagor, who from March, 1835, to March, 1841, was the town clerk, and the reference to the mortgage was first entered on the index by the subsequent town clerk in August or September, 1844. There is no evidence that the mortgagees had any knowledge of the neglect of the town clerk to enter their mortgage on the alphabet, and they must be taken to be ignorant of it. No other objection is made to the record, but the want of an index to it, and it is to be treated as having been in all other respects regular and sufficient.

The question is, whether the neglect of the clerk to index the mortgage, shall render the record of it invalid, so as to postpone the title of the mortgagees to that of the subsequent purchase.

The determination of this question must depend upon the construction of the Statutes of 1797 in relation to the recording of conveyances, which Statutes were in force when both deeds were lodged in the town clerk's office.

The 5th section of the Act for Regulating Conveyances of Real Estate, specifies the several requisites of such conveyances. It declares "that all deeds or other conveyances of any lands, tenements or hereditaments, lying in this State, signed and sealed by the party granting the same, having good and lawful authority thereunto and signed by two or more witnesses, and acknowledged by such grantor or grantors before a justice of the peace, *and recorded, at length, in the clerk's office of the town, in which such lands, tenements or hereditaments lie*, SHALL BE VALID TO PASS THE SAME, without any other act or ceremony in law whatever."

If the language of this Statute were to be taken in its ordinary sense and serve to control our decision, there would seem to be but little doubt of its effect. There would in regard to the mortgage appear to have been a full and literal compliance with the words of the Statute. The mortgage had been *transcribed* at length in the town clerk's office, and by the proper officer, and duly certified as recorded; and that is what is commonly understood as constituting a record of it.

It is, however, said, that although the ordinary signification of the word "recorded" may be satisfied by what was done in this case, yet, that the Act regulating town meetings and the choice and duty of town officers, is to be construed as providing an additional requisite to the record of conveyance — in other words, as in effect declaring that a deed shall not be considered as recorded, until an index to it is entered upon the alphabet.

No such language is, however, found in that Act, nor do we think any intention to engraft such additional requisite upon a deed can be fairly implied from the language used. The object of the Act is to point out the duty of the clerk, not only in the making of a proper

record of conveyances, *but also in furnishing facilities for* their discovery, examination and use by all persons interested in them. And to secure the due performance of these duties the clerk is made liable to the party injured for the neglect of them, and to the security of the party injured is superadded, by a subsequent Statute, the responsibility of the town. The index or alphabet, which it is the duty of the clerk to have annexed to his book, seems to be one of the facilities to be used in making search for the record, not a part of the record itself. It is his duty to have an index, and to enter upon it a proper reference to every record of a conveyance, and for any neglect to do so, he and the town are liable for the damages any person may suffer by it. But it is not certain that any one will be injured by the neglect, and therefore the record itself should not be void. The clerk may know the place of the record and may point it out to all who may wish to examine it. A purchaser may take his deed, relying alone upon the representations or covenants of his grantor, without desiring to examine the records. An index, or the want of it, would seem to be of no importance to him. So if without making any search or causing any to be made, a purchaser should rely solely on the representations of the clerk, that the title was clear, and those representations should be knowingly false, it is perhaps questionable whether he could be said to be injured by the want of an index. That would only seem to become important when an actual search of the records was desired to be made. The legitimate ground of complaint in such case would probably be the fraudulent representations of the clerk.

There are many practical difficulties in the way of making an index to the record an essential requisite to the validity of the title. The Statute provides for an "index or alphabet." Are the two words used synonymously? Or have they here, as they often have, different meanings? Is it indispensable that the index should be in alphabetical order? If so, shall the name of the grantor or the grantee be alphabetted? Or shall there be two indexes, one of each? Must the Christian name be written at length, or will the initials be sufficient? It is obvious, that if an index is held to be an essential part of the record, the way will at once be opened for a serious and embarrassing course of litigation in settling by judicial construction, what shall constitute a sufficient index, and what departures from a prescribed form shall render the record invalid. And all this, perhaps, when there has been no real injury to any one in consequence of a defective index.

But if from the want of an index, or a proper entry upon it, the record is to be inoperative, shall it be held absolutely void? If the reference to it upon the index be not made the instant the record is completed, is the record a mere nullity? Or may the record be restored and made operative by a subsequent entry upon the index? If so, when does the record take effect? If from the entry on the index, how is the true time to be shown? Shall the clerk certify upon the record the time of the entry? That has never been done. The true

time the record takes effect must then in all cases be left open to be proved by parol! In this case it appears by the evidence of the town clerk, that the plaintiff's mortgage was first alphabetted some time in August or September, 1844.

This evidence is quite too loose and uncertain, from which to determine when a record is to become operative, as all parol evidence necessarily must be. It is obvious, that if an entry of a deed upon the index is held to be essential to the validity of the record, that it must necessarily lead to inextricable confusion and uncertainty in regard to the priority of conveyances. Indeed, the difficulties in the way of a decision to that effect, appear to us to be insurmountable. On the other hand, we do not perceive but that the object of the Statute's providing for the recording of deeds will be fully answered by leaving anybody, actually sustaining an injury from the want of an index, or by a defective one, to his Statute remedy against the clerk and the towns.

The case of *Sawyer* v. *Adams*, 8 Vt. R. 172, has been relied upon by the defendants' counsel, as having an important bearing upon the question in this. But our decision does not conflict with the law of that case. The facts in that case were peculiar. From them, the court found that there had been in effect no record of the deed upon the book of records. Chief Justice Williams, in delivering the opinion of the majority of the court, puts the case upon that ground. He says "that recording means the copying the instrument to be recorded into the public records of the town, in a book kept for that purpose, by or under the superintendence of the officer appointed therefor." This, the court held, had not in that case been done. But it had clearly been done in this case. The deed was copied by the town clerk into the proper book, in the proper place, and duly certified as recorded, which would doubtless have been held by the court at that time, to have been sufficient.

We are all agreed that the proper office of the index is, what its name imports, *to point to the record*, but that it constitutes no part of the record; and we must consequently hold, that the plaintiff's mortgage became an encumbrance upon the land from the time it was transcribed upon the record, and that the defendant Lyman took his title subject to it.

The result is, that the decree of the Court of Chancery is to be affirmed, with directions to that court to fix upon a time for redemption and to carry this decree into effect.

MIMS *v.* MIMS.

SUPREME COURT OF ALABAMA. 1859.

[*Reported* 35 *Ala.* 23.]

APPEAL from the Chancery Court at Claiborne.

Heard before the *Hon. Wade Keyes.*

The bill in this case was filed by Cullen Mims, against Stanford Mims and the heirs-at-law of John J. Sessions, deceased; and sought to foreclose a mortgage on a tract of land. The mortgage was executed by said Sessions, on the 14th February, 1855; and acknowledged an indebtedness on his part to Cullen Mims, "in the sum of one hundred and twenty-two 40–100 dollars, to be paid on or before the first day of May next, *and the further sum of five hundred dollars, to be paid on or before the first day of January next;*" which sums it purported to secure. This mortgage was duly acknowledged before a justice of the peace, and was filed in the office of the probate judge, for registration, on the 5th March, 1855; but the transcribing officer, in recording it, omitted the words which are italicized, so that it appeared from the record to be a security only for the sum of $122.40. On the 2d day of March, 1857, the land was sold by the sheriff of the county, under an execution against Sessions, which was issued on a judgment rendered in the fall of 1856, and was purchased at the sale by Stanford Mims, who, in his answer to the bill, alleged that he had no notice whatever of the mortgage, save that which he had derived from an inspection of the records, and that he bought the land because he considered it worth more than the sum which the mortgage, as recorded, purported to secure; and he insisted that he was entitled to protection, except as to that portion of the mortgage debt. A formal answer was put in by a guardian *ad litem* for all the infant heirs, and a decree *pro confesso*, after irregular publication, was entered against one of the adult heirs, who was a non-resident. On final hearing, on pleadings and proof, the Chancellor rendered a decree for the complainant, and ordered a sale of the mortgaged lands; and his decree is now assigned as error, together with the irregular decree *pro confesso.*

S. J. Cumming, for appellant.

R. C. Torrey, contra.

A. J. WALKER, C. J. By the sale under execution, the entire interest of Sessions, the mortgagor, passed from him, as fully as it could have done by a sale made by himself. Code, § 2455. After the entire interest of the mortgagor had thus been transferred to the purchaser at the sale under execution, the mortgagor was not an indispensable or necessary party defendant to the mortgagee's bill to foreclose the mortgage; and so, after his death, his heirs would not have been necessary parties defendant. *Batre* v. *Auze*, 5 Ala. 173; Story's Eq. Pl. § 197.

2. Stanford Mims, the purchaser at the sale under execution, could not have obtained a dismissal of the complainant's bill in the court below, upon the ground that the heirs of Sessions were not made parties, if the bill had omitted to make them parties. He could not object that persons were not made parties, unless those persons were necessary parties. For a like reason, he cannot complain on error that a non-resident, one of the heirs of Sessions, who was not a necessary party, was not brought before the court by a regular publication, filling the requisitions of the Statute. He himself was the only necessary defendant, and it is not conceivable that his rights have been in any wise prejudiced by the failure to perfect service by publication in a legal manner as to an unnecessary party.

3. Upon the merits of the case, the decree of the Chancellor was right. Section 1270 of the Code makes a conveyance "operative as a record" from the day of the delivery to the judge of probate. The object and effect of this section are clearly to place the conveyance, as soon as the grantee has discharged his entire part in procuring the record, by having it properly proved, or acknowledged and delivered to the officer, in the same attitude as if it were spread upon the record book. This Statute relieves a party, who has done all that is devolved upon him by the law, from the consequence of the failure of the probate judge to discharge his duty, or of the imperfect manner in which he discharges it. The conveyance being operative as a record from its delivery to the judge, no subsequent mistake of his could deprive it of the operation thus given it by law. It follows that, under the Statute above referred to, the mortgage is not impaired in its efficiency against purchasers or creditors, by the fact that there was a mistake in copying it upon the record, whereby it was made to seem to be a security for a smaller amount than that actually provided for in the mortgage. This view of our Statutes renders it unnecessary for us to examine the decisions in *McGregor and Darling* v. *Hall*, 3 St. & P. 397; *Frost* v. *Beekman*, 1 John. Ch. 288; *Beekman* v. *Frost*, 18 Johns. 544.

The decree of the Chancellor is affirmed.

MILLER *v.* BRADFORD.

SUPREME COURT OF IOWA. 1861.

[*Reported* 12 *Iowa*, 14.]

ACTION to recover lot number one, in block number five, in the city of Keokuk. Both parties claim under James Muir, to whom the lot was decreed in the partition of the Half Breed Reservation, prior to the respective conveyances under which the parties claim. The plaintiff claims the whole lot by virtue of a deed from Muir, dated August

22d, 1842, duly acknowledged and recorded. The defendants claimed under a deed from Muir, dated March 22d, 1842, filed for record April 14th, and recorded April 21st, 1842.

On the trial, after the plaintiff rested, the defendant introduced in evidence the last mentioned deed, with the certificates of acknowledgment and of the filing and recording of the same; and then offered to prove possession under the same, at the date of the conveyance to plaintiff. On plaintiff's objection, the evidence of possession was excluded,

The deed under which defendants claimed conveyed from Muir to the grantee therein named "the one-half of his *individual* right, title, interest and claim," to the property in controversy. In the record copy, by mistake of the recorder, the word *undivided* occurs in two places in the deed, instead of the word, "*individual*." To show these discrepancies between the original and record copy, the plaintiff offered in evidence the record, which was received against the objections of defendants.

On the plaintiff's motion, the court instructed the jury, "that at the time of the purchase by said George Hunt [the grantee through whom plaintiff claims] of the lot in controversy, from James Muir, from whom both parties in this case claim to derive title, there was no such record of the deed under which defendant claims, as to give constructive notice thereof to Hunt." The defendants asked the court to instruct the jury, that when the deed under which they claimed "was left for record with the recorder of deeds, and filed for record by him, it imputed notice to subsequent purchasers, and the erroneous or defective recording by the recorder of said deed, could not change the character and effect of such notice," — which was refused.

Judgment for the plaintiff, and defendants appealed.

George C. Dixon, for the appellants. *Samuel F. Miller*, pro se.

WRIGHT, J. I. For the purpose of bringing home to defendant, or those under whom he claims, notice of an outstanding title, plaintiffs proposed to prove possession of the premises in controversy, and improvements made thereon by them, or those from whom they claim, at the time of the inception of defendant's title. The rejection of this testimony was correct under the rule established in *Hopping* v. *Burnam*, 2 G. Greene, 39, and *Wilhelm* v. *Mertz*, 4 Ib. 54. When the deed was not recorded, the Statute then in force required *actual* notice. This Statute has been long since repealed. It on two several occasions, received a construction as above, which we are not disposed to change, whatever might be our view, if now presented for the first time.

II. This was an action of right. The deed under which defendants claim, was made, filed for record, and recorded prior to that under which plaintiff claims. Plaintiff had no *actual* notice of the prior deed, and claims that he had no *constructive* notice. The deed under which defendants claim, was improperly recorded, that is to say, the

recorder made a material mistake in transcribing it. The question is, whether the defendants or plaintiff shall suffer the consequences of this mistake. The court below held, that the record of the deed under which defendants hold was not constructive notice to plaintiff, and that plaintiff's title must therefore prevail.

Upon authority the question is not free from difficulty. The leading case in this country is *Frost* v. *Beekman*, 1 John. Ch. 288, which clearly sustains the position of appellee. And while counsel for appellants (following probably the remarks of the court in *M'Gregor* v. *Darling*, 3 Stew. & Port. 401) fall into the error of saying that this case was reversed on this point, in the Court of Errors (18 John. 544), an examination will show that it was not reversed on this question, but another, and that the doctrine of Chancellor Kent was expressly affirmed. And this view, we think, is better sustained by the authorities, as well as by reason and argument; and we hold, therefore, that in this respect the court below, did not err. The authorities are collected and presented in the brief of counsel, and we need not refer to them.

III. Appellants insist, however, that under the Statute of 1839, in force at the time of depositing their deed for record, the deposit with the recorder was all that was necessary to give the notice required by the Statute, and that whether recorded or not, or however defectively recorded, they are not to suffer.

In this inquiry we have nothing to do with the validity of the deed from Muir to Gaines, under whom defendants claim, as between them. Nor are we considering a case where the deed was deposited for record, remaining in the recorder's office, with no attempt to record, but a case where a deed was deposited, and so incorrectly recorded as to mislead a subsequent purchaser, and then withdrawn, leaving the record as the only notice of the conveyance.

The Statute of 1839 provided that an instrument in writing, certified and acknowledged as required by the Statute, "shall from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof, and all subsequent purchasers, and mortgagees shall be deemed in law and equity to purchase with notice." And again, that until deposited with the recorder for record, no such instrument should be valid except between the parties thereto, and such as have actual notice thereof. Sections 30–31, Acts of 1839, ch. 28, p. 35.

This Statute in our opinion was only intended to fix the *time* from which notice to subsequent purchasers was to commence, and not to make such filing or depositing notice of the contents *after* the same was recorded. After the record of the deed, the record itself is the constructive notice of its contents, and it never was the intention of the Legislature to hold a subsequent purchaser, buying after the recording, bound by the contents of a deed, ever so improperly and incorrectly recorded, because at some time, a deed correct in the description of the property, was filed with the recorder. *Judgment affirmed.*

BARNEY *v.* McCARTY.

SUPREME COURT OF IOWA. 1864.

[*Reported* 15 *Iowa*, 510.]

THIS is an action brought to foreclose a mortgage upon lot 12, block 29, City of Keokuk, executed by Jonathan McCarty to Marsh, Lee, & Delavan, for balance of purchase money, and which has now become the property of petitioner.

The mortgage was dated 23d of October, 1847, duly acknowleged 25th of October, 1847, filed in the recorder's office of Lee County for record on the 17th day of December, 1847, and was recorded at large on the 7th day of January, 1848, in book 2, page 186, being in its proper order and place in said records; and on the original instrument is indorsed a memorandum of the date of filing, date and book and page of the record, which is signed by the recorder, all in the manner required by law. All this is admitted; but it appears no index to the said record was made until after this suit was commenced, which was in January, 1859. In the mean time said McCarty had sold said lot, and the several defendants have become owners of parts thereof, who now claim to be innocent purchasers for value, without notice. In an amended petition, all defendants are charged with having personal notice, but the proof taken fails, it is admitted, to bring this home to any except Wm. and R. L. Ruddick and Guy Wells.

The District Court rendered a personal judgment against McCarty, the mortgagor, but refused to decree said lot or any part thereof to be sold to pay said mortgaged indebtedness. From this the plaintiff appeals, and holds that the court should have ordered said lot to be sold to pay the purchase-money due him.

H. Scott Howell, for the appellant.

Rankin and *McCrary*, with whom was *R. H. Gilmore*, for the appellee.

DILLON, J. I. The first ground upon which the appellant seeks to reverse the decree below is, that the defendants, Wm. and R. L. Ruddick and Guy Wells, had actual notice of the mortgage in suit at the time when they respectively purchased the portions of the lot now owned by them.

This question cannot for several reasons be examined in this court. By the Revision (§ 3000) mortgages are to be foreclosed as in cases of ordinary proceedings; and by section 2999 the court on appeal "shall try only the legal errors" [of the cause] "duly presented, as in a case of ordinary proceedings, including the sufficiency of the facts stated on the record as the basis of the judgment to warrant the same."

As to Guy Wells, the record does not show that there was any finding of the facts, either by a jury or by the court, as required by the last

cited section of the Revision. As to the Messrs. Ruddick an issue was made to a jury, who found that they had no notice independent of the record of the mortgage in suit at the time when the deed of trust under which they claim was executed. No exception was taken to this finding of the jury and no motion was made to set the same aside as being against the weight of evidence or for any other cause. There is, therefore, no "legal error duly presented" to the appellate court for its review so far as relates to the question of actual notice. See *Doctorman* v. *Webster*, decided at the present term.

II. It is furthermore claimed, by the plaintiff, that Ruddick is not a *bona fide* purchaser, because, on the day on which he purchased under his deed of trust and before the completion of such purchase, he was notified by the plaintiff's agent of the existence of the mortgage in suit. The fact of such a notice is conceded, and the only question which arises is, what effect, if any, it will have upon Ruddick's rights? To sustain his position, the plaintiff refers to *Thomas* v. *Graham*, Walk. Ch. 118; *Jewett* v. *Palmer*, 7 John. Ch. 65; and *Miner* v. *Willoughby*, 3 Minn. 239; which are to the effect that "A plea of a *bona fide* purchaser, without notice, must aver not only a want of notice at the time of the purchase, but also at the time of its completion, and of the payment of the money. The money must be actually paid before notice." Many other cases might be referred to, establishing the same principle.

But, unfortunately for the plaintiff, his case does not fall within the reason upon which this principle is based. If Ruddick had no notice at the time when he advanced his money and received his deed of trust in security therefor, no subsequent notice can affect him or in any way cut down his rights. He is in law considered as occupying as high ground as an absolute purchaser, from the moment he parts with his money. Mortgagees are within the protection of the Statute, as well as purchasers. (R. S., 1843, p. 208, § 30; Code, 1851, §§ 1211–1214; *Porter et al* v. *Green et al.*, 4 Iowa, 571.)

III. We now arrive at the principal and most important question in the cause, and that is, whether the defendants are affected with constructive notice of the plaintiff's mortgage.

And this raises but one inquiry, viz., whether under the registration laws then in force, the *total omission* by the recorder to index this mortgage, deprived the record thereof of the power of imparting constructive notice of its existence and contents.

The prior decisions of this court, although not covering a case precisely like the present, aid nevertheless most materially in its solution. In other States there exists a most perplexing conflict of authority respecting the question whether the grantee in an instrument, or a subsequent purchaser, shall suffer for the mistake or omission of the recorder in registering it, or neglecting to register it. By some courts it is considered, that where the party has duly deposited his deed with the proper officer for record, he has performed his whole duty, and consequently the subsequent mistake or neglect of the recorder will not

affect him or invalidate his title. (*Nichols* v. *Reynolds*, 1 R. I., 30, 31; *Cook* v. *Hall*, 1 Gilm., 575; 2 Sug. Ven., 466; *Merrick* v. *Wallace*, 19 Ill., 486; *McGregor* v. *Hall*, 3 S. & P., 401; 10 Ala., 368; *Beverly* v. *Ellis*, 1 Rand. [Va.], 106.)

In the case last cited, the court went so far as to hold, that where a deed is filed for record, it is in contemplation of law recorded, though it should, in consequence of being stolen, never be entered upon the record. But the current of authority is otherwise, holding it to be the duty of the party filing the instrument, as between him and a subsequent *bona fide* purchaser, to see that all of the pre-requisites of a valid and complete registration are complied with. (*Frost* v. *Beekman*, 1 John. Ch., 288; 10 John., 544; *Jennings* v. *Wood*, 20 Ohio, 261; 8 Verm., 175; 1 Story's Eq. Jur., § 404; 10 Verm., 555.) And this question, conceded not to be free from difficulty, was upon solemn deliberation settled in this court in *Miller* v. *Bradford et al.*, 12 Iowa, 14. With this decision we are content, and the question cannot be regarded as being any longer an open one in this State. Agreeably to the doctrine there established, it was the duty of the mortgagee of the instrument in suit, to see that the essential requirements of the registry law were observed; for, unless substantially observed, the registry thereof would not impart constructive notice to subsequent mortgagees or purchasers, and consequently the loss, if any, will fall upon him or his assignee, and not upon them.

We now advance one step further, with a view to ascertain whether the indexing of the mortgage was an essential requirement of the Statute. The mortgage in question was executed and filed for record during the time when the Revised Statutes of 1843 ("The Blue Book") were in force. There are three Acts which relate to this subject, viz.: 1st. Section 30 of the Act of February 16, 1843 (R. S., 202), entitled "An Act to regulate Conveyances." 2d. Sections 3 and 4 of the Act of February 14, 1843 (R. S., 442), entitled "An Act concerning Mortgages." 3d. Section 4 of the Act of January 23d, 1843 (R. S., 541), entitled "An Act relating to the Office of Recorder of Deeds."

These laws were all passed at the same session, and within a month of each other. Being *in pari materia*, they are not only to be construed together, but to be construed, if it can fairly and reasonably be done, so as to give operation and effect to each.

Taking these Acts as a whole, they very clearly point out the successive steps which together constitute a complete and therefore valid registration of an instrument. As constructive notice, by means of recorded instruments, depends wholly upon statutory provisions, it is necessary carefully to examine those provisions. As concerns the present inquiry, the substance of the Act of February 16, 1843, is, that the proper instrument "shall be recorded in the office of the recorder of the county in which the real estate is situated" (§ 29), and "shall (§ 30), from the time of filing the same with the recorder, impart notice to all persons of the contents thereof."

While provision is thus made as to the effect of filing, no provision is made as to the manner of filing, or noting, or mode of recording. The Act of February 14, § 2 (R. S., 442), after repeating almost literally the above language, as to the effect of filing, proceeds, in the next section (3), thus to point out the duty of the recorder: "It shall be the duty of the recorder to indorse on every mortgage filed in his office for record, and note in the record the precise time such mortgage was filed for record."

By analyzing the fourth section of the Act of January 23, 1843, it will be seen that the recorder is required to perform the following acts, not only with respect to mortgages, but all instruments authorized to be recorded:

1. "File all deeds, &c., presented to him for record, and note on the back of the same the hour and day when they were presented for record."

2. "Keep a fair book on which he shall *immediately* make an entry of every deed, giving date, parties, description of land, dating it on the day when it was filed in his office."

3. "Record all instruments in regular succession."

4. "Make and keep a complete alphabetical index to each record book, showing page on which *each* instrument is recorded, with the names of the parties thereto."

This Act is silent as to the time when notice commences, but is specific as to the mode of making and keeping the registry.

Reading these various Statutes together in the light of the known objects of registration laws, the court is of opinion that each of the following steps is necessary to be substantially observed, in order to constitute a compliance with their requirements:

1. The instrument must be deposited or filed with the recorder for record. He thereupon notes the fact and "the hour and day" on the back thereof, and the day on "the fair book," as it is styled, and retains the instrument in his office. The instrument itself thus remaining on file in his office, with the indorsement upon it, and the entries in the "fair book," which are required to be immediately made, constitute the notice until the instrument is actually extended upon the records.

2. The next step in the process is the recording, that is, the copying of the instrument at large into the "record book," and noting in it the precise time when it was filed for record. The object of this noting is that the record may show on its face when the notice commences.

3. The third and final step is the indexing of the instrument so recorded. The Statute prescribes the requisites of the index. It shall be a complete alphabetical index to each record book, and shall give the names of the parties, and show the page where each instrument is recorded. The paging cannot, of course, be given until the deed is actually transcribed into the record book, and up to this time it remains on file. When recorded and indexed, the deed may be withdrawn, and

the record takes its place and constructively imparts notice to the world of its existence and contents.

Keeping in view alike the well-known objects and the enlightened policy on which the Registry Acts are based, as well as the language and requirements of the several Statutes above cited, the court are of the opinion, that all three of these steps are essential integral parts of a complete valid registration. It follows that, inasmuch as the plaintiff's mortgage was never indexed at all until after the defendant's right attached, the record thereof was so incomplete and defective as not constructively to charge subsequent purchasers or mortgagees with notice.

And having stated the result, we might here properly conclude, were it not due to the elaborate research of counsel, as evinced in their arguments, that we should state somewhat more at large the reasons for our opinion.

The plaintiff's counsel, looking at a detached portion of these Acts, rests his case wholly upon the statutory declaration, that notice of the existence of the mortgage shall date "*from the time the same is filed in the recorder's office for record.*" As the filing is but one step in a series of steps, this language presupposes, and is in fact based upon the assumption that the other, and in the order of time, the subsequent requirements of the law, will be observed. We ask this question: Would the mere filing be notice, if the instrument were never recorded, and if the grantee should voluntarily withdraw it before registration? Certainly not; and yet the literal construction which is insisted on by the plaintiff would so require us to hold.

Again: The meaning of this language has been determined by the recent decision of *Miller* v. *Bradford et al.*, 12 Iowa, 14. "This Statute," says Wright, J., "in our opinion, was only intended to fix the *time* from which notice to subsequent purchasers was to commence, and not to make such filing or depositing notice of the contents *after* the same was recorded." The correctness of this view is supported by both reason and authority. Without this provision, it would remain uncertain whether notice dated from time of filing, or only from the time of actual registration; and to settle and fix this most material matter was the cardinal and primary design of the Legislature. See on this point *Barney* v. *Little et al.*, decided at the present term.

We are referred to the case of *Cook* v. *Hall*, 1 Gilm., 575, as being against the view we have taken. It is true that the Illinois Statutes are the same as ours, and the case is apparently, but yet not really, in point. The deed in that case was deposited with a deputy recorder *de facto*, who omitted to enter it on the "fair book" provided for by the law, but the deed itself remained on file. The court held that it was notice from the time of filing the same, and that the requisition about the entry in the "fair book" was only directory. The case did not turn on the necessity of an alphabetical index, after the deed was registered and withdrawn. Besides this case, as well as the subsequent one of

Merrick v. *Wallace*, 19 Ill. 486, in the reasons given for the decision, conflicts with the doctrine of this court in *Miller* v. *Bradford*, *supra*, inasmuch as it is considered that any omission or fault of the recorder must fall upon a subsequent purchaser, and not upon the party who files the instrument for record.

Plaintiff also relies upon *Curtis* v. *Lyman*, 24 Vt. 334. The court in this case, under a Statute which provided "That a book or books, *with an index or alphabet to the same*, suitable for registering deeds, &c., should be kept in each *town*, in which the clerk should truly record all deeds," &c., held, that an innocent party was affected with notice of a mortgage which, though duly recorded, was never indexed. In setting forth the reasons for this decision, the court says:

"It is obvious that if an index is held to be an essential part of the record, the way will at once be opened for a serious and embarrassing course of litigation in settling, by judicial construction, what shall constitute a sufficient index, and what departures from a prescribed form, shall render the record invalid; and all this perhaps when there has been no real injury to any one in consequence of a defective index. But if, from the want of an index, or a proper entry upon it, the record is to be inoperative, shall it be held absolutely void? If the reference to it upon the index be not made the instant the record is completed, is the record a mere nullity? Or may the record be restored and made operative by a subsequent entry upon the index? If so, when does the record take effect? . . . We are all agreed that the proper office of the index is to point to the record, but that it constitutes no part of the record." As our Statute prescribes the requisites of the index which it requires, these reasons would not be applicable to it.

With us the practice has always been to search for titles through the names of the successive owners, and by means of the index. With us alienations of real estate are easy and numerous. There is not, as in Vermont, a registry in each town, but only one for each county. The record books are consequently numerous and voluminous. It is utterly impracticable to examine them page by page. It is stated in the argument that the record books in Lee County already number some thirty volumes. An index is a necessity. The evidence in this case shows that an index was kept, but for some reason the mortgage in this suit was wholly omitted from it. If no index was required or kept, a searcher for titles would know what he had to do. But if one is kept, and if a given instrument is omitted and yet the record affects the purchaser with notice, it is a snare which will entoil the most diligent and careful.

A deed, in the language of counsel, might as well be "buried in the earth as in a mass of records without a clew to its whereabouts," or in the language of the Supreme Court of Vermont, in *Sawyer* v. *Adams*, 8 Verm., 172, the instrument might as well be written "on a slate or copied into the recorder's Family Bible, as into a book without being indexed."

We are also cited to *McLaren* v. *Thompson*, 40 Maine, 284. This case and *Handley* v. *Howe*, 22 Maine, 560, are, as they seem to us, confirmatory of our position. The Statute required "a noting on the book and on the mortgage of the time when the same was received."

The court (40 Maine, 284) says: "As there is an interval, longer or shorter as the case may be, between the delivery of an instrument to be recorded, and the recording of the same, the object of the above provision of the Statute is to protect the grantee, *during the time between the noting and recording.* The Statute, it will be seen, required the noting both on the mortgage and the book; and provided that the instrument "should be considered as recorded, when left with the clerk as aforesaid." It was held, that a noting on *both* was essential to make it constructive notice against an attachment levy. *Handley* v. *Howe*, 22 Maine, 560.

The analogies of the law support our view. Thus, an undocketed judgment is no notice. 2 Sug. Ven., 104.

To hold that an index is not essentially part of a valid and complete registration in this State, would overlook the uniform practice of relying wholly upon it to find the names of the various owners in tracing titles, and would also ignore the fundamental design of the Recording Acts, which is to give certainty and security to titles, by requiring all deeds and all liens to be made matters of public record, and thus discoverable by all persons who are interested in ascertaining their existence and who will examine the records in the mode which the law has pointed out. *Cummings* v. *Long*, 16 Iowa, 41.

Decree affirmed.

NOTE. — Cf. *Gillespie* v. *Rogers*, 146 Mass. 610 (1888).

SECTION V.

AGAINST WHAT CONVEYANCES UNRECORDED DEEDS ARE GOOD.

ADAMS *v.* CUDDY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1833.

[*Reported* 13 *Pick.* 460.]

TRESPASS *quare clausum*. The defendant pleaded soil and freehold in himself; and issue was taken on that fact.

Upon a case stated it appeared, that the *locus in quo* was parcel of a larger tract of land in South Boston, which was set off to Sarah Baker, wife of William Baker, upon the division of the estate of her father, James Blake, deceased, and that both parties claim title from her.

On December 21, 1807, William Baker executed a deed with covenants of seisin and warranty, purporting to convey the *locus in quo* to Jonathan Simonds in fee, and describing it accurately by metes and bounds. The wife of Baker joined in the deed, according to the following clause: "In witness whereof I the said William Baker, and my wife, in consideration of one dollar paid to me by said Simonds, do forever quit my right and fee in said premises, and we have hereto set our hands and seals," &c. This deed was not recorded till June 3, 1808. On June 17, 1808, Simonds conveyed the same land to the plaintiff, and the deed was recorded on the same day.

On March 24, 1808, William Baker and wife executed a deed to William's father, Allen Baker, containing the following clauses, to wit: "I, William Baker &c. and Sarah Baker, my wife, in her right, for in consideration of six hundred dollars paid me by my honored father, Allen Baker &c., I do, by these presents, the receipt acknowledge, and release and forever quitclaim all the right and title to the land I have in South Boston, so called, formerly a part of the estate of James Blake, housewright, deceased: — And I, Sarah Baker, for myself, for the above sum mentioned do, for myself, forever release and forever quitclaim all my right and title to my honored father aforesaid, together with my right of dower, the receipt whereof we do hereby acknowledge, grant, bargain, sell and convey unto our honored father aforesaid, to him, his heirs," &c. This deed contained no covenant. It was recorded on March 28, 1808.

On the decease of Allen Baker, Rebecca Baker, his widow, was appointed administratrix of his estate, and being duly authorized to sell his real estate, for the payment of his debts, conveyed to Calvin Baker, by a deed dated March 20, 1818, and recorded the next day, all the interest of the deceased in a certain tract of land in South Boston, described by metes and bounds. This tract was a portion of the land set off to Sarah Baker and included the *locus in quo*. Calvin Baker, by a deed dated November 8, 1821, and recorded the next day, conveyed the same tract to the defendant.

The depositions of William and Sarah Baker, who were both living at the time of the supposed trespass, were put into the case, for the purpose of showing, that at the time when they conveyed to Allen Baker, he had notice of the prior deed to Simonds.

It was agreed, that if the plaintiff was entitled to recover, the defendant should be defaulted, and judgment rendered for the plaintiff for 30 dollars damages and costs; otherwise the plaintiff was to become nonsuit.

The case was argued in writing by *D. A. Simmons*, for the plaintiff, and *Rand* and *Fiske*, for the defendant.

SHAW, C. J., delivered the opinion of the court. The question between these parties is a question of title only, it being admitted that the defendant has done acts, which if he cannot justify on the ground of title, amount to a trespass.

The first question is, upon the effect of the deed of William Baker and wife to Simonds. It is certainly a very imperfect, illiterate, and ill drawn conveyance. It is contended, that there are no words of grant or conveyance on the part of the wife; and this certainly seems to be the case, if, according to the natural and grammatical construction of the language, the words are those of the husband only. But we do not consider that the court is called on to decide what *quantum* of estate passed by this deed. If any estate passed and that continued till the time of the alleged trespass, it is sufficient for this action.

The husband was seised in right of his wife. It does not appear by the facts, whether there were children of the marriage; if there were, the husband had an inchoate tenancy by the curtesy, which was an estate for his own life; but if there were not, he had a freehold, determinable upon the contingency of surviving his wife. In either way of considering it, he had a seisin; and such estate as he had passed by his deed to his grantee. It appears by the depositions in the case, that William Baker and his wife were both living, when the supposed trespass was committed, and therefore that the plaintiff had a title at that time sufficient to enable him to maintain the action.

But another ground of defence more confidently relied upon, is, that before the above deed was registered, the same estate was conveyed to Allen Baker, father of William, through whom the defendant claims, without notice of the prior conveyance, and the subsequent deed was first registered; and so that the defendant has the better title; and the dates of the execution and registry of the respective deeds would seem to maintain this ground.

To this the plaintiff makes two answers, first, that the subsequent deed from William Baker and wife, to his father Allen Baker, did not include the land before conveyed to Simonds; and secondly, that Allen Baker, the grantee, had notice of the prior conveyance to Simonds.

That the administratrix of Allen Baker supposed that the deed from William to his father embraced the premises, is manifest from the fact, that she included that parcel in her deed to Calvin Baker, made in pursuance of a sale under a license; and Calvin Baker, in like manner, included it in his deed to the defendant. But if the estate did not vest in Allen Baker, then his administratrix had no authority to convey it, and her deed was void. And the court are all of opinion, that the deed of William Baker and wife to his father, did not embrace the premises. This deed is quite as illiterate and informal, as the one above remarked upon. It is, however, the deed of William Baker and his wife, and all the clauses of grant and release, are the language of both, and bind the estate of both; and informal as it is, it is to have its legal effect. The deed contains no covenants, of any kind. The words, "grant, bargain, sell and convey," are contained, but they come after the description, the words preceding it being "re-

lease and quitclaim." But without placing any reliance upon these informalities, we rest our opinion upon this; that examining the deed most critically, it does not purport to convey any land specifically, but only "all the right and title to the land I have in South Boston, formerly a part of the estate of James Blake, housewright, deceased;" and then afterwards the wife adds, "all my right and title to my honored father aforesaid;" probably the word "estate" of her father's was omitted by mistake. Now, we think the effect of conveying all the right and title I have, by fair construction, means all that has come to me and that I have not legally parted with. But the deed to Simonds, whether registered or not, gave a good title as against the grantor and his heirs. This therefore he had legally parted with, and it did not come within the general description of the estate conveyed. Were it construed otherwise, the grantors might in effect commit a fraud, without intending or even being conscious of it. Where a grantee takes by so indefinite a description as the right which the grantor has, he must take the risk of his grantor's right.

But upon the other ground, we are strongly inclined to the opinion, that the plaintiff has the better title. We do not perceive, that William Baker and Sarah Baker were not competent witnesses. In the deed to his father, there is no covenant. In that to Simonds there are covenants of seisin and warranty. It is agreed, that William Baker and his wife were then seised and had a good and indefeasible title. Should Simonds or his grantee lose their title in consequence of not registering their deed, the warrantor would not be liable on his warranty for such defect. There seems to be no case in which Baker can be liable on his warranty; and if so, he is disinterested and a competent witness.

The effect of his testimony is, that when he conveyed to his father, the latter had notice of his prior conveyance to Simonds. If such was the case, he could never set up his title, though his deed was first registered, against the prior unregistered deed to Simonds. And though if Calvin Baker and the defendant had taken a deed from Allen, without notice of such defect in his title, the title might be indefeasible in them, yet this principle would not apply here, as they did not take a deed of him, but of his administratrix, who could only sell such estate as he had. But what is more important, before the defendant took his deed of Calvin Baker or the latter took his of the administratrix, the deeds from William Baker to Simonds and from the latter to the plaintiff, had been recorded; which was constructive notice to them. Now I take the rule to be, that if a grantee takes with notice of a prior unregistered deed, and he conveys to a second grantee, with like notice, the second, as well as the first, is precluded from setting up the subsequent deed, against the prior unregistered deed.

Defendant defaulted.

EARLE *v.* FISKE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1870.

[*Reported* 103 *Mass.* 491.]

WRIT OF ENTRY against Elizabeth L. Fiske (wife of Benjamin Fiske), and Mary E. Fiske, to recover land in Malden. Writ dated April 14, 1868. Plea, *nul disseisin*.

At the trial in the Superior Court, before *Putnam*, J., these facts appeared: Nancy A. Fiske, being owner of the demanded premises, conveyed them to Benjamin and Elizabeth for their lives, and, subject to their life estate, to Mary E. Fiske, by deeds dated April 22, 1864, but not recorded till 1867, and died in 1865, leaving said Benjamin, her son, as her sole heir, and he in 1866 executed and delivered to the demandant a deed of the premises, which was recorded in the same year. Upon these facts, the judge ruled that Nancy A. Fiske "had no seisin, at her death, which would descend to Benjamin Fiske, so as to enable him to convey a good title" to the demandant. Upon this ruling, the demandant, who made no claim to any estate less than a fee simple, submitted to a verdict for the tenants, and alleged exceptions.

J. G. Abbott, for the demandant.

R. D. Smith and *H. H. Sprague*, for the tenants.

AMES, J. The formalities which shall be deemed indispensable to the valid conveyance of land are prescribed and regulated by Statute. A deed duly signed, sealed and delivered is sufficient, as between the original parties to it, to transfer the whole title of the grantor to the grantee, though the instrument of conveyance may not have been acknowledged or recorded. The title passes by the deed, and not by the registration. No seisin remains in the grantor, and he has literally nothing in the premises which he can claim for himself, transmit to his heir at law, or convey to any other person. But when the effect of the deed upon the rights of third persons, such as creditors or *bona fide* purchasers, is to be considered, the law requires something more, namely, either actual notice, or the further formality of registration, which is constructive notice. It may not be very logical to say that, after a man has literally parted with all his right and estate in a lot of land, there still remains in his hands an attachable and transferable interest in it, of exactly the same extent and value as if he had made no conveyance whatever. But, for the protection of *bona fide* creditors and purchasers, the rule has been established that although an unrecorded deed is binding upon the grantor, his heirs and devisees, and also upon all persons having actual notice of it, it is not valid and effectual as against any other persons. As to all such other persons, the unrecorded deed is a mere nullity. So far as they are concerned, it is *no* conveyance or transfer which the Statute recognizes as binding

on them, or as having any capacity adversely to affect their rights, as purchasers or attaching creditors. As to them, the person who appears of record to be the owner is to be taken as the true and actual owner, and his apparent seisin is not divested or affected by any unknown and unrecorded deed that he may have made. Gen. Sts. c. 89, § 3.

It is argued, however, that, as the unrecorded deed from Nancy A. Fiske was valid and binding upon herself and her heirs at law, nothing descended from her to her son Benjamin, and he had no seisin or title which he could convey to the plaintiff. A case is cited (*Hill* v. *Meeker*, 24 Conn. 211) in which the Supreme Court of Connecticut (Hinman and Storrs, JJ.) in 1855 decided that a deed of land, not recorded until after the death of the grantor, is valid against a purchaser from his heir at law, although such purchaser has no knowledge of the existence of the deed. From this decision the Chief Justice (Waite) dissented, saying, "So far as my researches have extended, this is the first case in the whole history of our jurisprudence, in which it has ever been holden that an unrecorded deed shall defeat the title of a *bona fide* purchaser or mortgagee, having no knowledge of the existence of any such deed, unless it were recorded within a reasonable time." The cases cited from the decisions of the Supreme Court of Kentucky are to the effect also that the protection afforded by their registration laws against an unrecorded deed only extend to purchasers from the grantor himself, and not to purchasers from his heirs or devisees. *Ralls* v. *Graham*, 4 T. B. Monr. 120; *Hancock* v. *Beverly*, 6 B. Monr. 531. That court however in a more recent case, decided in 1857, say that, if it were a new question, "and had not been heretofore decided," they should be strongly inclined to give to the Statute a liberal construction, and make it operate as a remedy for the whole evil which it was intended to guard against. They add, however, that as the previous decision had become a settled rule of property, it is better that the law should remain permanent, "although settled originally upon doubtful principles." *Harlan* v. *Seaton*, 18 B. Monr. 312.

We do not, under the circumstances, incline to yield to the authority of these cases in the construction of a local Statute of this commonwealth. It appears to us that the plain meaning of our system of registration is, that a purchaser of land has a right to rely upon the information furnished him by the registry of deeds, and in the absence of notice to the contrary he is justified in taking that information as true, and acting upon it accordingly. It is impossible to see why the unrecorded deed of Nancy A. Fiske should have any greater weight or force after her decease than it had immediately after it was first delivered. It could not be any more or less binding on her heir at law than it was upon herself; he was as much the apparent owner of the land as she had been during her lifetime. The manifest purpose of our Statute is, that the apparent owner of record shall be considered as the true owner (so far as subsequent purchasers without notice to the contrary are concerned), notwithstanding any unrecorded and

unknown previous alienation. As against the claim of this plaintiff, the unrecorded deed of Nancy A. Fiske had no binding force or effect, and the objection of the defendants, that in consequence of her having given that deed nothing descended to her son Benjamin from her, is one of which they cannot avail themselves. As a purchaser without notice, the plaintiff is in a position to say that the unrecorded deed had no local force or effect; that she died seised; that the property descended to Benjamin, her son and sole heir at law. Upon that assumption, his deed would take precedence over the unrecorded deed of his mother, in exactly the same manner as a deed from his mother in her lifetime would have done over any unrecorded or unknown previous deed from herself. The ruling at the trial was therefore erroneous, and the plaintiff's

Exceptions are sustained.

MARSHALL *v.* ROBERTS.

SUPREME COURT OF MINNESOTA. 1872.

[*Reported* 18 *Minn.* 405.]

THE plaintiff, claiming that the defendant was the owner of certain real estate, and that after having sold and conveyed the same to him, and knowing his deed was unrecorded, he sold and conveyed the same premises to other parties, who were purchasers in good faith, and whose deeds were recorded, brought this action to recover damages therefor. At the trial, after the plaintiff had introduced his evidence and rested, the defendant moved for a dismissal of the action. The court granted the motion and judgment of dismissal was entered. The plaintiff appeals to this court. The facts upon which the decision is based, are fully stated in the opinion of the court.

Lorenzo Allis, for appellant.

Lampreys, for respondent.

BERRY, J. For the purpose of determining the only question necessary to be considered in this case, we may assume that the following propositions, which plaintiff claims to have proved, or to have offered to prove, are true as matter of fact: —

1st. That on the 12th day of May, 1860, Louis Roberts was the owner of lot four, in block four, of the town of St. Paul, according to the recorded plat thereof.

2d. That on said 12th day of May said Roberts, together with his wife, executed and delivered to the plaintiff, Joseph M. Marshall, a quitclaim deed of all their right, title, interest, claim, and demand, in and to said lot, which deed through inadvertence on plaintiff's part has never been recorded.

3d. That on the 2d day of August, 1865, said Roberts (well knowing his deed to Marshall, and Marshall's inadvertent omission to have

the same recorded) for a valuable consideration, executed and delivered (his wife joining) to Uri L. Lamprey a quitclaim deed of all their right, title, interest, claim and demand in and to said lot, which deed was duly recorded August 3d, 1865, the said Lamprey at the time of said conveyance to him, and at the time of paying the consideration therefor, having no notice of the aforesaid conveyance to the plaintiff.

4th. That on the 22d day of May, 1867, said Lamprey and wife, for a valuable consideration, executed and delivered to William J. Cutler a warranty deed of said lot, which was duly recorded on the 29th day of May, 1867, the said Cutler at the time of such conveyance to him, and at the time of paying the consideration therefor, having no notice of said conveyance to the plaintiff, and having purchased in good faith.

Plaintiff's claim is, that by reason of defendant's deed to Lamprey, and the recording thereof, he (plaintiff) has lost his title to the lot in question, and has therefore suffered damage to the value of said lot, which damage he seeks to recover of defendant in this action.

If the deed from Roberts to plaintiff conveyed nothing to plaintiff, the subsequent deed to Lamprey can have taken nothing away from him, or, in other words, it cannot have damaged the plaintiff.

If on the other hand, as would appear from the facts before assumed, the deed from Roberts to plaintiff conveyed a good title to the lot in question, or any right, title, interest, claim, or demand in or to it, then, neither such good title, nor any such right, title, interest, claim or demand, could be taken away or impaired by the subsequent conveyance to Lamprey. For the deed to Lamprey is a quitclaim deed in common form, the effect of which, under our Statute, is to pass such estate as the grantor could lawfully convey by the ordinary deed of bargain and sale. In *Martin* v. *Brown*, 4 Minn. 291, it is held that the Legislature by the words "lawfully convey," intend to limit the estate conveyed by a quitclaim deed, to such as the grantor has a legal right to convey, and that as he may not lawfully convey land which he has already conveyed to another, nothing passes by such deed beyond the grantor's actual interest at the time of the conveyance. And in *Hope* v. *Stone*, 10 Minn. 152, where there was a conveyance (by warranty deed) of all the right, title, interest, &c., &c., of the grantor in and to certain land, it was held that nothing passed to the grantees by the conveyance which the grantor had previously conveyed to the other parties. (See also cases there cited.) In *Everest* v. *Ferris*, 16 Minn. 26, the rule thus laid down in *Martin* v. *Brown*, is reiterated; and independently (so far as appears) of any Statute, it is held in *May* v. *Le Claire*, 11 Wallace, 232, that a party who has acquired his title by a quitclaim deed cannot be regarded as a *bona fide* purchaser without notice, and that such conveyance passes the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey. The provisions of our Statute in regard to the effect of recording and failing to record deeds, are also

in entire harmony with the views expressed in the case cited. Sec. 54, *ch.* 35, Pub. Stat., which seems to have been in force at the time when Roberts made the deed to Lamprey, enacts that every conveyance by deed, &c., shall be recorded, &c., and that every such conveyance not so recorded shall be void, as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded. Substantially the same provisions as those above mentioned, are also found in sec. 24, chap. 46, Rev. Stat., and sec. 21, *chap.* 40, Gen. Stat., so that our Statute in this particular seems to have remained unchanged. These provisions, as will appear upon a moment's reflection, so far from militating against the views expressed in the cases cited, come to their aid, since it is only the purchaser of the *same* real estate, or any portion thereof, who by his priority of record cuts out the title of a prior purchaser. For when the second purchaser obtains by his quitclaim deed only what his grantor had (his grantor's right, title and interest) at the time when such deed was made, he is not a purchaser of the *same* real estate (or any part *thereof*) which his grantor had previously conveyed away and therefore no longer has. But besides this, the grantee in a quitclaim deed like that from Roberts to Lamprey, though he may not in fact have known that his grantor had previously conveyed the described premises to another, and though he may not in fact have intended to defraud such prior grantee, is not a purchaser in good faith as against such prior grantee, for nothing is attempted to be transferred to him, except whatever right, title, &c., the grantor has at the time when the quitclaim deed is executed, so that as in the case of *Hope* v. *Stone* the very terms of the deed are notice of the existence of the rights which have been conferred upon such prior grantee, or any other person.

These considerations, as it seems to us, dispose of this case and prevent us from reaching the questions mainly discussed by plaintiff's counsel.

The judgment entered below dismissing the action is affirmed.

FITZGERALD *v.* LIBBY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1886.

[*Reported* 142 *Mass.* 235.]

CONTRACT to recover $100, paid by the plaintiff to the defendant at a sale by auction of certain land, under a power of sale contained in a mortgage held by the defendant. Trial in the Superior Court, before *Knowlton*, J., who allowed a bill of exceptions, in substance as follows: —

The land sold to the plaintiff is composed of lots 288 and 289 on a plan of a large tract of land formerly belonging to Daniel Ayer, and known as "Ayer's new city," said city being situate in Lowell, westerly of the Boston and Lowell Railroad, and southerly of the Chelmsford Road, so called.

The two lots were struck off to the plaintiff as the highest bidder at said auction, and the plaintiff, in accordance with the terms of sale, paid the defendant $100 at the time of the sale. The plaintiff afterwards refused to accept a deed, on the ground that the two lots in question were not included in the mortgage under which the defendant assumed to sell them.

The mortgage in question was executed by Daniel Ayer, on October 20, 1854, and was recorded on October 24, 1854. The lots conveyed were described as follows: —

"All my Silver Lake land, so called, situate in Wilmington in said county, being all the land in said town bought by me of Charles F. Abbott by deed duly recorded in Middlesex registry, and also of one Jacob Manning, and also of one Jones and one Durgin, all adjoining and on a plan made by one Butterfield, and for further description reference is made to deeds of said several pieces duly recorded in said registry, saving and excepting a few lots thereof which I have already conveyed. Also all the land in said Wilmington by me purchased of one Jaques of Worcester, to which deed, duly recorded in said registry, reference is made for further description, except a few lots by me conveyed. For Manning deed, see Book 691, page 81. For Jaques, Book 688, page 96. See also other deeds in said registry. Also all those parcels of land situated in Wilmington, in said county of Middlesex, which were conveyed to me by James Holton by his deed dated June 7th, A. D. 1854, and recorded in the Middlesex county registry of deeds, Book 688, page 123 and 124, excepting certain parts thereof which I have heretofore sold and conveyed by my deeds. Reference may be had to said Holton's deed to me, and the record thereof, and of the deed of parts thereof given by me heretofore, for a full and perfect description of the premises. Also all the land by me owned and situate in my new city, so called, in said Lowell, being land situate in said Lowell westerly of Boston and Lowell Railroad, and southerly of the Chelmsford Road, so called; for boundaries and description reference is made to deeds to me, recorded in said registry."

On January 6, 1852, Daniel Ayer conveyed lot 288, by a warranty deed, to David Corner. This deed was recorded on May 16, 1855. On January 6, 1852, Ayer also conveyed lot 289 to Lyman J. Sanborn. This deed was recorded on January 12, 1856.

The defendant contended that the description in the mortgage included, in legal effect, said two lots 288 and 289, and passed the same as against said prior deeds, and asked the judge so to rule. The judge ruled in accordance with this request, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

A. G. Lamson (*J. J. Hogan* with him), for the plaintiff.

G. F. Richardson and *F. W. Qua*, for the defendant.

C. ALLEN, J. The only question is whether, by the true construction of the mortgage, lots 288 and 289 are to be deemed to have been included in the description of the land conveyed thereby. If they are, the plaintiff cannot recover. If they are not, his exceptions must be sustained. In determining this question, we must look at the whole of the mortgage, in the light of the circumstances under which it was given.

It embraces four different parcels, or clusters of parcels, of land. In respect to the first three of these, there is in each case a description of land, or a reference to deeds which are designated, sufficient to enable one to ascertain the boundaries of a larger quantity of land originally owned by the grantor, from which he had conveyed certain portions or lots to former purchasers. That is to say, the grantor, having bought in each case a large lot of land, and having sold portions thereof, then granted the residue by a mortgage in effect describing the whole of the large lot, and excepting therefrom such portions as he had already conveyed. By a somewhat cumbersome process, any one familiar with the premises could ascertain precisely what was intended to be included in the mortgage. In respect to the fourth parcel, however, the phraseology was changed, and the language of the conveyance is as follows: "Also all the land by me owned and situate in my new city, so called, in said Lowell, being land situate in said Lowell westerly of Boston and Lowell Railroad, and southerly of the Chelmsford Road, so called; for boundaries and description reference is made to deeds to me recorded in said registry." No deeds are specifically designated, and there is no exception of lots already conveyed by him. In point of fact, it appears that there was a large tract of land in Lowell, formerly belonging to Ayer, the grantor, and known as "Ayer's new city," which was the same "new city" mentioned in the mortgage, and the lots 288 and 289 were a part of said new city, and were shown on a plan of the whole tract, and had been sold by the grantor prior to the giving of the mortgage, by warranty deeds not recorded until after the mortgage was recorded. Whether or not other lots had also been sold by him does not appear in distinct terms. But it may be inferred that the large tract was either actually improved, or was designed to be improved, by laying it out into streets, and lots for sale.

The bill of exceptions is rather meagre in its facts. But, taking such facts and circumstances as we have, it seems to us that the change in the phraseology, when the fourth parcel was to be described, shows that the intention was to include only such land as the grantor then owned. There is no specific description of land, and no specific designation of deeds where a description can be found. The conveyance is a mortgage, and not an absolute deed. The reference to the source of the grantor's title is of the most general description: "for boundaries and descriptions reference is made to deeds to me recorded in said

registry." This reference, while certainly entitled to some weight, is entitled to less than if it were more specific; and, in view of the whole instrument, it is not sufficient to lead to the conclusion that the grantor intended to convey all that was conveyed to him by those deeds. In all the earlier instances, where there was a definite exception of lots already conveyed away by the grantor which otherwise would form a part of the premises described, the description of the whole original tract was also more definite.

In this last instance, where, for some reason, the original tract is not described, the change of phraseology and the omission of such an exception support the inference that a similar result was intended to be reached, and that the grant was understood to be limited to such portion of the large tract as was then owned by the grantor. It can hardly be supposed that he would intend to include in the mortgage land which he had already granted away to others. The grantee in the mortgage was fairly put upon inquiry. If he was content to accept a grant with so indefinite a description, he must take the risk. Otherwise, if the grantor had sold all of the large tract but two or three scattered lots, and then made a deed like the present for the purpose of conveying what was left, it would take effect in priority to any former deeds which might chance to remain unrecorded, thus working a practical fraud on the earlier grantees, and entirely subverting the grantor's intention. Where a conveyance is made with no particular description of the land, the words "all the land by me owned" are more naturally understood to mean "all the land now owned by me;" which is equivalent to "all the land which I have not heretofore conveyed;" and such, we think, is the true construction of the present mortgage.

We do not find that the case of *Woodward* v. *Sartwell*, 129 Mass. 210, which is principally relied on by the defendant, decides anything to the contrary of this; while the construction above given to the mortgage derives more or less support from numerous other decisions in this State and elsewhere. *Worthington* v. *Hylyer*, 4 Mass. 196; *Adams* v. *Cuddy*, 13 Pick. 460; *Sweet* v. *Brown*, 12 Met. 175; *Chaffin* v. *Chaffin*, 4 Gray, 280; *Hoxie* v. *Finney*, 16 Gray, 332; *Jamaica Pond Aqueduct* v. *Chandler*, 9 Allen, 159; *Mills* v. *Shepard*, 30 Conn. 98; *Brown* v. *Jackson*, 3 Wheat. 449; *Hamilton* v. *Doolittle*, 37 Ill. 473; *McConnel* v. *Reed*, 4 Scam. 117; *Starling* v. *Blair*, 4 Bibb, 288; *Morrell* v. *Fisher*, 4 Exch. 591.

For these reasons, in the opinion of a majority of the court, the entry must be

Exceptions sustained.[1]

[1] See also *Coe* v. *Persons Unknown*, 43 Me. 432 (1857); *Walker* v. *Lincoln*, 45 Me. 67 (1858); *Eaton* v. *Trowbridge*, 38 Mich. 454 (1878).

JOHNSON *v.* WILLIAMS.

KANSAS SUPREME COURT. 1887.

[*Reported* 37 *Kan.* 179.]

EJECTMENT, brought by Williams against Johnson, to recover certain land in Elk County. Judgment for plaintiff, at the May Term, 1885. The defendant brings the case here. The opinion states the material facts.

Bowen and *Kirkpatrick*, for plaintiff in error.

Scott and *Frith*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J. This was an action in the nature of ejectment, brought by D. H. Williams against Samuel M. Johnson for the recovery of certain real estate in Elk County. The record clearly shows that Williams is the legal owner of the land in controversy, unless his title thereto has been divested by a certain tax deed and other proceedings founded thereon, which will be hereafter mentioned. On September 17, 1881, the aforesaid tax deed was executed by the county clerk of Elk County to Anna Eby, and was recorded on September 20, 1881. On said day, Anna Eby executed a quitclaim deed for the land to Lark Vinson, which deed was recorded on December 10, 1881. On September 26, 1881, Vinson commenced an action in the District Court of Elk County against the said defendant, D. H. Williams, and others, to quiet his title to the property in controversy, and obtained service of summons by publication only. On December 8, 1881, a judgment was rendered in that action, quieting Vinson's title as against all the defendants in that action. On December 10, 1881, Vinson executed a quitclaim deed for the property to Richard M. Roe, which deed was recorded on December 19, 1881. On July 22, 1882, said Roe by his quitclaim deed remised, released, and quitclaimed unto Samuel M. Johnson, the plaintiff in error, defendant below, all his right, title and interest in and to the land, which deed was duly recorded on July 25, 1882. On October 12, 1882, Williams filed his motion in the District Court of Elk County to open up said judgment under § 77 of the civil code; and such proceedings were had that on November 8, 1883, the motion was sustained and Williams permitted to defend in the action. On March 7, 1884, a trial was had in the action, and judgment was rendered in favor of Williams and against Vinson, decreeing Williams to be the owner in fee simple of the land, and quieting his title as against Vinson and all persons claiming under him. This present action of ejectment was commenced on August 8, 1884, and was tried before the court without a jury, and judgment was rendered in favor of Williams and against Johnson for the recovery of the land and for costs. Johnson brings the case to this court for review.

It is admitted that Johnson in purchasing the property paid value therefor, and at the time had no knowledge of the claim of Williams; or, in other words, it is admitted that Johnson was "*a purchaser in good faith*" of the property, provided a purchaser taking a *quitclaim deed* for the property can be "a purchaser in good faith." In this State a quitclaim deed to land will convey to the grantee all the rights, interests, title and estate of the grantor in and to the land, unless otherwise specified by the deed itself. (Conveyance Act, § 2; *Utley* v. *Fee*, 33 Kas. 683, 691.) Such deed will convey such of the covenants of former grantors as run with the land. (*Scoffins* v. *Grandstaff*, 12 Kas. 467.) And the grantee in a quitclaim deed will be entitled to such further title or estate as may inure at any time to the grantees of such former grantors by virtue of such covenants as run with the land. (See case last cited.) But a quitclaim deed will not estop the maker thereof from afterward purchasing or acquiring an adverse title or interest, and holding it as against his grantee. (*Simpson* v. *Greeley*, 8 Kas. 586, 597, 598; *Bruce* v. *Luke*, 9 Id. 201, 207, *et seq.*; *Scoffins* v. *Grandstaff*, 12 Id. 469, 470; *Young* v. *Clippinger*, 14 Id. 148, 150; *Ott* v. *Sprague*, 27 Id. 624.) And a person who holds only by virtue of a quitclaim deed from his immediate grantor, whether he is a purchaser or not, is not a *bona fide* purchaser. (*Bayer* v. *Cockerill*, 3 Kas. 283, 294; *Oliver* v. *Piatt*, 44 U. S. 333, 410; *May* v. *Le Claire*, 78 Id. 217, 232; *Villa* v. *Rodriguez*, 79 Id. 323; *Dickerson* v. *Colgrove*, 100 Id. 578, 584; *Baker* v. *Humphrey*, 101 Id. 494, 499; *Runyon* v. *Smith*, 18 Fed. Rep. 579; *United States* v. *Sliney*, 21 Id. 895; *Watson* v. *Phelps*, 40 Iowa, 482; *Smith* v. *Dunton*, 42 Id. 48; *Besore* v. *Dosh*, 43 Id. 211, 212; *Springer* v. *Bartle*, 46 Id. 688; *Pastel* v. *Palmer*, [Sup. Ct. of Iowa,] 32 N. W. Rep. 257; *Bragg* v. *Paulk*, 42 Me. 517; *Coe* v. *Persons Unknown*, 43 Id. 432; *Ridgeway* v. *Holliday*, 59 Mo. 444; *Stoffel* v. *Schroeder*, 62 Id. 147; *Mann* v. *Best*, 62 Id. 491; *Rodgers* v. *Burchard*, 34 Tex. 441, 452; *Harrison* v. *Boring*, 44 Id. 255; *Thorn* v. *Newsom*, 64 Id. 161; *Richardson* v. *Levi*, [Sup. Ct. of Tex.,] 3 S. W. Rep. 444; *Smith's Heirs* v. *Branch Bank of Mobile*, 21 Ala. 125, 134; *Derrick* v. *Brown*, 66 Id. 162; *Everest* v. *Ferris*, 16 Minn. 26; *Marshall* v. *Roberts*, 18 Id. 405; *Woodfolk* v. *Blount*, 3 Hayw. [Tenn.] 146; *Smith* v. *Winston*, 3 Miss. 601; *Kerr* v. *Freeman*, 33 Id. 292, 296; *Learned* v. *Corley*, 43 Id. 688; *Leland* v. *Isenbeck*, 1 Idaho, 469; *Baker* v. *Woodward*, 12 Ore. 3, 10; same case, 6 Pac. Rep. 174, 178; *Richards* v. *Snyder*, 11 Ore. 511; same case, 6 Pac. Rep. 186; *Snowden* v. *Tyler*, [Sup. Ct. of Neb.] 31 N. W. Rep. 661, 668; *McAdow* v. *Black*, 6 Mont. 601; same case, 13 Pac. Rep. 377, 380, 381; *Martin* v. *Morris*, 62 Wis. 418; same case, 22 N. W. Rep. 525; *Laurens* v. *Anderson*, [Tex.] 1 S. W. Rep. 379; *Dodge* v. *Briggs*, 27 Fed. Rep. 160; *Peaks* v. *Blethen*, [Me.] 1 Atl. Rep. 451.) It may be that with reference to some equities or interests in real estate, the purchaser who holds only under a quitclaim deed may be

deemed to be a *bona fide* purchaser; for equities and interests in real estate may sometimes be latent, hidden, secret and concealed, and not only unknown to the purchaser, but undiscoverable by the exercise of any ordinary or reasonable degree of diligence. It is possible also that a purchaser taking a quitclaim deed may under the registry laws be considered a *bona fide* purchaser with reference to a prior unrecorded deed with respect to which he has no notice nor any reasonable means of obtaining notice. (*Bradbury* v. *Davis*, 5 Col. 265; *Butterfield* v. *Smith*, 11 Ill. 485; *Brown* v. *Banner Coal and Coal Oil Co.*, 97 Id. 214; *Fox* v. *Hall*, 74 Mo. 315; *Graff* v. *Middleton*, 43 Cal. 341; *Pettingill* v. *Devin*, 35 Iowa, 344. But, *contra*, see *Thorn* v. *Newsom*, 64 Tex. 161; same case, 53 Am. Rep. 747, and note; *Pastel* v. *Palmer*, supra.)

We should think that in all cases, however, where a purchaser takes a quitclaim deed he must be presumed to take it with notice of all outstanding equities and interests of which he could by the exercise of any reasonable diligence obtain notice from an examination of all the records affecting the title to the property, and from all inquiries which he might make of persons in the possession of the property, or of persons paying taxes thereon, or of any person who might, from any record or from any knowledge which the purchaser might have, seemingly have some interest in the property. In nearly all cases between individuals where land is sold or conveyed, and where there is no doubt about the title, a general warranty deed is given; and it is only in cases where there is a doubt concerning the title that only a quitclaim deed is given or received; hence, when a party takes a quitclaim deed, he knows he is taking a doubtful title and is put upon inquiry as to the title. The very form of the deed indicates to him that the grantor has doubts concerning the title; and the deed itself is notice to him that he is getting only a doubtful title. Also, as a quitclaim deed can never of itself subject the maker thereof to any liability, such deeds may be executed recklessly, and by persons who have no real claim and scarcely a shadow of claim to the lands for which the deeds are given; and the deeds may be executed for a merely nominal consideration, and merely to enable speculators in doubtful titles to harass and annoy the real owners of the land; and speculators in doubtful titles are always ready to pay some trifling or nominal consideration to obtain a quitclaim deed. This kind of thing should not be encouraged. Speculators in doubtful titles are not so pre-eminently unselfish, altruistic, or philanthropic in their dealings with others as to be entitled to any very high degree of encouragement from any source. There are cases which are claimed to be adverse to the opinions herein expressed. They will be found cited in Martindale on Conveyancing, §§ 59 and 285, and notes, and 12 Cent. L. J. 127.

Not wishing to decide anything further in this case than is necessary to be decided, our decision will be as follows: A person who holds real estate by virtue of a quitclaim deed only from his immediate

grantor, whether he is a purchaser or not, is not a *bona fide* purchaser with respect to outstanding and adverse equities and interests shown by the records or which are discoverable by the exercise of reasonable diligence in making proper examinations and inquiries.

The judgment of the court below will be affirmed.

All the justices concurring.

DOW *v.* WHITNEY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1888.

[*Reported* 147 *Mass.* 1.]

BILL IN EQUITY, filed August 7, 1887, for the specific performance by the defendant of an agreement to purchase land. The facts of the case are as follows.

On November 2, 1857, Stephen Dow became the owner of a tract of land in Brookline, including the premises in question, by deeds, which were duly recorded, from Samuel A. Robinson and others, and from Otis Withington, and subsequently conveyed portions of it, other than such premises, to different persons by deeds also recorded.

On November 1, 1878, Stephen Dow, by a deed, which contained the usual covenants of warranty, conveyed to "Alfred A. Dow, his heirs and assigns, all my interest in all that lot of land, with the buildings thereon, situated on Corey Hill, in Brookline, in the county of Norfolk and Commonwealth aforesaid, bounded on the north by Summit Avenue; east by land now or late of William Woods; north again by said Woods; east again by land now or late of Thomas Griggs; south by land of Henry M. Whitney, land of Mrs. John M. Clark, and Beacon Street; and west by land now or late of E. D. Jordan *et al.*, formerly of James Bartlett; being the same premises conveyed to me by S. A. Robinson *et al.*, also by Otis Withington, by deed dated November 2, 1857, and recorded with Norfolk Deeds, book 261, page 279, . . . hereby conveying to said grantee all the land conveyed to me by the deeds aforesaid, except such portions thereof as I have heretofore sold."

On October 1, 1879, Alfred A. Dow, by a deed of like tenor as the above, conveyed "all my interest" in the same land to the plaintiff, who, on February 23, 1887, entered into an agreement in writing with the defendant for its sale and purchase, she to give a "good and clear title to the same free from all incumbrances."

The defendant contended that the deeds from Stephen Dow to Alfred A. Dow, and from the latter to the plaintiff, conveyed only such interest as each grantor actually had at the time of the delivery thereof, and was subject to possible unrecorded deeds theretofore made by each,

but of which there was no evidence, and that the plaintiff could not make title in accordance with the agreement.

Hearing before *C. Allen*, J., who ordered a decree for the plaintiff; and the defendant appealed to the full court.

H. W. Chaplin and *J. R. Carret*, for the defendant.

A. Hemenway and *M. T. Allen*, for the plaintiff.

MORTON, C. J. It is clear that the clause following the specific description in Stephen Dow's deed, beginning, "being the same premises," etc., was not intended to limit the prior granting clause of the deed, or to alter the description, but was inserted for the purpose of showing the grantor's chain of title. *Lovejoy* v. *Lovett*, 124 Mass. 270.

The principal question in this case is whether the deed of Stephen Dow conveyed to the grantee a title which is superior to that of any grantee by a prior unrecorded deed of the grantor. This question was fully considered and discussed in *Woodward* v. *Sartwell*, 129 Mass. 210. In that case, it was held that a deed by an officer, upon a sale on execution of "all the right, title, and interest" of the judgment debtor in land specifically described in the deed, took precedence of a prior unrecorded deed of the judgment debtor, and conveyed to the purchaser a good title. The court put the decision upon the ground, that an attaching creditor has the same standing as a *bona fide* purchaser, and that the deed of the officer "is equivalent to a conveyance made by the debtor at the time the attachment was made; and in the case at bar, as the record title then stood in the name of the debtor, as to *bona fide* purchasers, he was the owner of the land."

We are satisfied that these views are correct. We can see no sound distinction between a deed made by an officer upon a sale on execution, and a deed made by the debtor himself. In either case, the deed conveys all the title which the debtor had, and no more; but a prior unrecorded deed has no effect except as between the parties to it, and others having notice of it, and as to creditors and purchasers leaves the title in the grantor. *Earle* v. *Fiske*, 103 Mass. 491.

A deed of "all the right, title, and interest," or of "all the interest," of the grantor in a lot of land, conveys the same title as a deed of the land. It is the policy of our laws that a purchaser of land, by examining the registry of deeds, may ascertain the title of his grantor. If there is no recorded deed, he has the right to assume that the record title is the true title. The law has established the rule, for the protection of creditors and purchasers, that an unrecorded deed, if unknown to them, is as to them a mere nullity. The reasons for the rule apply with equal force in the case of a deed of the grantee's right, title, and interest, as in that of a deed of the land. We are of opinion, therefore, that the deed of Stephen Dow conveyed to his grantee a title which is good against any prior deed, if unrecorded. To hold otherwise would defeat the purpose of the registration laws, and create confusion in the titles to land.

It is to be noticed that the deed in this case contains a specific description of the land intended to be conveyed, and contains the usual covenants of warranty. The case is thus distinguished from a class of cases relied upon by the defendant, in which it has been held that, where a deed contains no particular description, but only a general description, like "all my land," or "all the land I have in Boston," or other similar general description, it does not take precedence of prior unrecorded deeds of the grantor. See *Adams* v. *Cuddy*, 13 Pick. 460; *Jamaica Pond Aqueduct* v. *Chandler*, 9 Allen, 159; *Fitzgerald* v. *Libby*, 142 Mass. 235. In each of these cases the question was not as to the effect of a prior unrecorded deed of the same land, but it was whether the land previously sold was included within the description of the later deed. In other words it was a question of the construction of the deed relied upon. No such question can arise in the case at bar, as the description of the land intended to be conveyed is specific and exact. The same considerations apply to the deed from Alfred A. Dow to the plaintiff.

The defendant contends that specific performance of his contract ought not to be decreed, because, if compelled to take a conveyance, he may afterwards be exposed to litigation to defend his title. It is not known that there is any unrecorded deed made by Stephen Dow or Alfred A. Dow. The only alleged defect is, that there is a possibility that there is such a deed, and that the grantee in it may hereafter appear and contest the defendant's title.

The defendant ought not to be required to accept a title that is doubtful. But in this case there is no reasonable doubt that the plaintiff's deed conveys a good title. Its validity depends upon a pure question of law, and no question of fact is involved. The mere possibility that a claimant may hereafter appear and ask the court to overturn a well settled rule of law is not such a defect or doubt in the title as ought to lead the court in its discretion to deny to the plaintiff the right in equity to a specific performance of the contract. *Hayes* v. *Harmony Grove Cemetery*, 108 Mass. 400; *Chesman* v. *Cummings*, 142 Mass. 65.

As the parties agree to the form of the decree entered by the justice who heard the case, it should therefore be affirmed.

Decree affirmed.

SECTION VI.

EFFECT OF NOTICE.

BLADES *v.* BLADES.

CHANCERY. 1727.

[*Reported* 1 *Eq. Cas. Ab.* 358, *pl.* 12.]

IN a case between two purchasers of lands in Yorkshire, where the second purchaser having notice of the first purchase, but that it was not registered, went on and purchased the same estate, and got his purchase registered; yet it was decreed, that having notice of the first purchase, though it was not registered, bound him, and that his getting his own purchase first registered was a fraud, the design of those Acts being only to give parties notice, who might otherwise, without such registry, be in danger of being imposed on by a prior purchase or mortgage, which they are in no danger of when they have notice thereof in any manner, though not by the registry. By LORD CHANCELLOR KING decreed.[1]

DOE d. ROBINSON *v.* ALLSOP.

KING'S BENCH. 1821.

[*Reported* 5 *B. & Ald.* 142.]

EJECTMENT to recover certain premises in the parish of Saint Mary-le-bone, in the County of Middlesex. Plea general issue. The cause was tried before *Abbott*, C. J., at the Westminster sittings after Michaelmas Term, 1820, when a verdict was found for the plaintiff, subject to a special case upon the following facts. The demise was laid on the 2d day of March, 1818. By lease dated the 30th day of March, 1813, the premises in question were demised by Matthew Wood to George Stoddart, since deceased, for a term of 88 years. This lease was prepared by the then attorney of Stoddart, and left by Stoddart in his possession. About this time, the plaintiff, Robinson, paid large sums of money for, and on account of Stoddart, and by his desire also, paid a sum of £13 14*s.* 6*d.* for, and obtained the possession of the lease from the attorney who had prepared it, and with whom it had been left. On the 29th October, 1813, upon a settlement of accounts between Stoddart and Robinson, Stoddart gave to Robinson an acceptance for £83 5*s.*, which was then due to Robinson, in addition to the former sum of £13 14*s.* 6*d.*,

[1] See *Le Neve* v. *Le Neve*, Amb. 436 (1747).

and in the month of February, 1814, Robinson further paid on account of Stoddart, £70, and put into an auctioneer's hands the lease to be sold by public auction. At the sale, no person bidding sufficiently high for the premises, they were bought in, and the lease delivered back to Robinson. By indenture of the 25th day of July, 1814, in consideration of £190, Stoddart assigned the lease and premises to one Jeremiah Moore for all his term therein, but the lease remained in Robinson's possession. On the 4th day of November, 1815, Stoddart was discharged from the King's Bench prison, pursuant to an order of the court for the relief of insolvent debtors, and, upon his discharge, by indenture bearing date the 4th day of November, 1815, assigned all his estate, property, and effects in possession, remainder and reversion, to the provisional assignee of the insolvent debtors' court. This assignment was registered in the register office, in the County of Middlesex, on the 7th day of October, 1818. In the schedule of the said insolvent's estate, property, and effects, filed in court, and which accompanied the assignment to the provisional assignee of the court, the lessor of the plaintiff, Robinson, was stated and returned as a creditor of the insolvent, and the premises in question were stated to have been mortgaged or conveyed, and then to be in mortgage and conveyed for £60 to a Mr. Barton Greenwood, and also to the said Jeremiah Moore. On the 19th day of December, 1815, Moore put the premises up to sale by public auction. The auctioneer had not the original lease, which was at that time in Robinson's possession, but Robinson knew that he was about to sell the premises, and desired the auctioneer, if they went for a certain price, to buy them in for him. The premises, however, exceeded Robinson's price, and they were finally bought by one William Barton, and the auctioneer sometime afterwards told Barton, that if Robinson was paid £30 he would give up the lease, but Barton refused. On the 31st day of July, 1817, the plaintiff, Robinson, as one of the creditors of Stoddart, took an assignment from the provisional assignee of Stoddart, of all the insolvent's estate and effects, and the 7th October, 1818, registered the original lease of the 30th day of March, 1813, and also, at the same time, registered the assignment to the provisional assignee, and the assignment from the provisional assignee to him, dated the 31st of July, 1817, and brought an ejectment against the then tenant in possession, in Michaelmas Term, 1819, but was nonsuited by reason of his not being able to prove the discharge of Stoddart under the Insolvent Debtors' Act by the regular proof. On the 9th June, 1819, William Barton assigned the premises to the present defendant, George Alexander Allsop, for the term therein, and the plaintiff, Robinson, brought the ejectment against the present defendant, who appeared as landlord. The assignments by Stoddart to Moore of the 25th July, 1814, and assignment from Moore to Barton of the 13th July, 1816, were not registered until the 27th day of February, 1819.

Holt, for the plaintiff.

Abraham, contra.

ABBOTT, C. J. A court of law is now called upon for the first time, to put a construction on the words of this Statute, by which it is enacted, that every deed or conveyance that shall, after the 29th September, 1709, be made and executed, shall be adjudged fraudulent and void against any subsequent purchaser, or mortgagee, for valuable consideration, unless a memorial thereof be registered before the registering of the memorial of the deed or conveyance, under which such subsequent purchaser or mortgagee shall claim. Now it is impossible, that plainer words could be used, and I think, that, sitting in a court of law, we are bound to give effect to them, and that we cannot say, that this deed is not fraudulent and void within the meaning of this Act, because, possibly it may turn out upon examination, that the defendant is entitled to some relief in equity. If there be any such ground, a court of equity may interfere, and this case shows clearly how inconvenient it would be, if this court were to enter into any equitable considerations. For here, it is clear, that the lessor of the plaintiff had at all events a lien on the instrument of conveyance. What effect that might have on a court of equity, I cannot say, but I think it at least is a fit matter for its consideration. We, however, in a court of law, must give effect to the words of the Act.

BAYLEY, J. I am of the same opinion. The words of the Statute are, that such deeds or conveyances shall be adjudged fraudulent and void against every subsequent purchaser for valuable consideration. It is to be observed, that the words "*bona fide* purchaser" are not used. I think, therefore, that we are bound in a court of law to give effect to these words. That seems to have been the opinion of the judges in the cases cited, although they thought that a court of equity would, in some cases, interfere to relieve the party. It is so laid down by Lord Hardwicke, in *Le Neve* v. *Le Neve*, and the words of Lord Mansfield, in *Doe* v. *Routledge*, Cowp. 712, are these, "Equity says, if the party knew of the unregistered deed, his registered deed shall not set it aside, because he has that notice which the Act of Parliament intended he should have. He therefore puts it as a case in which equity would interfere; and the circumstances of this case show the propriety of our adhering to the words of the Act; for I am by no means clear that we should not work great injustice, if we were to decide in favor of the defendant.

BEST, J. The words of this Statute are quite clear, and in the absence of any case, I should think the plaintiff entitled to judgment. But it seems to me, that the case of *Le Neve* v. *Le Neve*, in which Lord Hardwicke considers the party under these circumstances as entitled to relief in equity, is an authority to show, that at law he is without defence.

HOLROYD, J., absent at chambers.

Judgment for the lessor of the plaintiff.

STROUD *v.* LOCKART.

SUPREME COURT OF PENNSYLVANIA. 1797.

[*Reported* 4 *Dall.* 153.]

SCIRE FACIAS on a mortgage. The mortgage had not been recorded, conformably to the Act of Assembly; and Lockart had purchased the premises. But, on the trial, the plaintiff proved, that Lockart knew of the existence of the mortgage at the time of his purchase, and said he would have to pay it, although it was not then recorded.

BY THE COURT. The case is too plain for controversy. The plaintiff must have a verdict; and all the trouble of the jury will be to calculate the interest.

Verdict for the plaintiff.[1]

MAYHAM *v.* COOMBS.

SUPREME COURT OF OHIO. 1846.

[*Reported* 14 *Ohio*, 428.]

THIS is a bill in chancery reserved in the County of Clermont.

This bill is filed by the complainant to foreclose a mortgage, and to procure the sale of mortgaged premises. Benjamin Coombs is the mortgagor, Anna Parker, a mortgagee, and Mathias Kagler, a judgment creditor. There are other defendants, but, for present purposes, it is unnecessary to specify the relations in which they stand to the case.

The facts, so far as respects the several mortgages and the judgment, are as follows: Anna Parker, on the 12th day of March, 1838, contracted to sell to Benjamin Coombs one hundred and one acres of land, and which is the only land about which there is any controversy, and gave to him a title bond. At the same time she took his note for the purchase money, signed by James Coombs as his security. On the 18th day of July, 1840, she conveyed the same land, by deed duly executed, and took back a mortgage, to secure the payment of $1,616, the balance due of the purchase money. This mortgage was recorded on the 11th day of November, 1840.

On the 30th day of October, 1840, Benjamin Coombs executed to the complainants a mortgage of the same premises to secure the payment of twelve hundred and sixty-nine dollars, which mortgage was entered for record on the day of its date.

[1] See *Britton's Appeal*, 45 Pa. 172 (1803).

This latter mortgage also covered fifty acres of land in addition to the one hundred and one acres, which, in 1837, had been mortgaged by Coombs to one Shadrack Lane, to secure the payment of two hundred and seventy dollars, which mortgage, on the 17th day of May, 1841, was assigned by Lane to the complainant. As to this fifty acres, there is not, at present, any controversy. On the 30th July, 1840, the defendant, Mathias Kagler, recovered a judgment in the Court of Common Pleas of Clermont County, against Benjamin Coombs, for $506.25 and costs of suit.

Anna Parker, in her answer to the bill, charges that the complainant, at the time he received his mortgage, had full notice of the existence of her mortgage, and that, with a view to defraud her, he procured his to be first received; and she calls upon him, by interrogatories, to answer this charge.

In answer, he denies notice peremptorily. Much evidence, however, is on file to prove notice, but the view of the case taken by the court, renders it unnecessary to abstract this evidence.

The defendant, Parker, further alleges, in her answer, that the consideration of the note secured by the complainant's mortgage, is made up, in a great measure, of exorbitant interest, and such exorbitant interest compounded, from time to time; and she calls upon him by interrogatories to answer this allegation, and to set forth the original consideration, which was the foundation of the note, and the manner in which it has been increased to its present amount.

These interrogatories the complainant refuses to answer, for the reason, as he alleges, that he is informed by counsel that he is not bound to make answer. This answer is excepted to.

John Jolliffe, for the complainant.

John W. Lane, for the defendant, Anna Parker.

Hitchcock, J. The facts in this case, show that the defendant, Anna Parker, has the oldest mortgage upon the premises in controversy, that mortgage bearing date the 18th of July, 1840, but it was not recorded until the 11th day of November following. Before this time, to wit, on the 30th day of October of the same year, the complainant had procured a mortgage of the same premises, which was entered for record on the day of its date.

Now, there can be no doubt that, under these circumstances, at law, the mortgage of the complainant is the preferable lien upon this land. The 7th section of the Act expressly declares that mortgages "shall *take effect from the time* when they are recorded; and if two mortgages are presented for record on the same day, they shall take effect from the order of presentation for record; the first presented, shall be the first recorded." — And if they take effect *from* such time, they surely could have had no effect before. It is claimed, however, that before recording a mortgage, although, in form, a legal mortgage, it "*takes effect*" as an equitable mortgage, and that a subsequent mortgage, with notice of this previous mortgage, will be postponed in equity. This

question was before the court at the last term, in the case of *Stansel* v. *Roberts* and others (13 Ohio Rep. 148), and it was decided that the lien of a second mortgage, first recorded, is preferred; that notice of a prior unrecorded mortgage will not, under the Ohio Statute, postpone the second mortgage, and that it does not make any difference that the first mortgage was given to secure money borrowed to pay for the land.

I am aware that this construction of the Statute is not entirely satisfactory to the profession, as the law thus construed interferes with previous received opinions of equity principles, as applicable to the subject. But it is not perceived how a different construction would have been put upon the Statute, by any rule of construction known in law. Mortgages "shall take effect from the time they are recorded," or, according to a subsequent Statute, from the time when entered or delivered for record. There is no ambiguity, no uncertainty, in the phraseology. It is plain and explicit. Not that it shall take effect at law, but that it shall take effect from that time. It is the delivery of the instrument to the proper officer, or at the proper office, for registry, that gives it vitality. There is no more impropriety in this legislation than there is in saying that a deed for the conveyance of land, although otherwise executed according to the forms of the law, shall not operate even as between the parties as a conveyance, until acknowledged before competent authority; yet such is our law; and it is held that such deed can, until acknowledged, be treated in no other manner than as contracts to convey.

The opinion that it was the intention of the Legislature that a mortgage should be recorded in order to give it vitality, is, as it seems to the court, perfectly apparent, from an examination of the different laws providing for the execution and acknowledgment of deeds. The fourth section of the Act of January 30th, 1818 (Chase Stat. 1041), "to provide for the proof and acknowledgment of deeds and other instruments of writing," provides, "that all deeds, mortgages, and other instruments of writing, executed agreeably to the first and second sections of this Act, shall be recorded within six months from the date of the same, within the county wherein such lands, tenements, and hereditaments are situate; and all deeds, mortgages, and other instruments of writing, executed agreeably to the third section of this Act, shall be recorded within six months from the date of the same, within the county wherein such lands, tenements, and hereditaments shall lie; and all such deeds, mortgages, and other instruments of writing, executed, acknowledged, or proved, and recorded as aforesaid, shall be good and valid in law; and if any deed, mortgage, or other instrument of writing, as aforesaid, shall not be recorded within the time limited, as aforesaid, such deed, mortgage, or other instrument of writing, shall be considered fraudulent against any subsequent *bona fide* purchaser or purchasers, without knowledge of the existence of such conveyance; provided, that such conveyance may be recorded after the expiration of

the time herein required, and shall, from the date of the record, be notice to any subsequent purchaser or purchasers."

The first and second sections of this Act relate to deeds executed within, the third, to deeds executed without, the State. Previous to this Act, one year was allowed for recording deeds of the latter description.

By this section it will be seen that unrecorded deeds, mortgages, and other instruments, were good as against subsequent grantees with notice.

This Act was repealed by an Act of the same title, passed February 24th, 1820. The fourth section of this Act, however, is substantially, if not identically, the same with the 7th section of the Act of 1818 (Ch. Stat. 1149); and it will be observed that, as to recording, and the effect thereof, mortgages are placed precisely on the same footing with other deeds of conveyance.

The last-named Act was repealed by the Act of 1831, the law now in force. By this latter law, a difference is made between mortgages and other deeds of conveyance. The 7th section provides, "that all mortgages, executed agreeably to the provisions of this Act, shall be recorded in the office of the recorder in the county in which such mortgaged premises are situated, and shall take effect from the time when the same are recorded; and if two or more mortgages are presented for record on the same day, the first presented shall be first recorded, and the first recorded shall have preference."

Then follows, in section seven, "that all other deeds and instruments of writing, for the conveyance, or *encumbrance* of any lands, tenements, or hereditaments, executed agreeably to the foregoing provisions, shall be so recorded, within six months from the date thereof; and if such deed or other instrument of writing, shall not be so recorded within the time herein prescribed, the same shall be deemed fraudulent, so far as relates to any subsequent *bona fide* purchaser, having, at the time of making such purchase, no knowledge of the existence of such former deed or other instrument of writing, and may be recorded after the expiration of the time herein prescribed; and from the date of such record, shall be notice to any subsequent purchaser."

It will be seen that, by this last legislation, mortgages and other instruments of writing, which before had been provided for in one section, are separated. Deeds of conveyance, other than mortgages, may be recorded within six months; but the principle is retained, that although not recorded, yet a subsequent purchaser, with notice, cannot defeat the title of the grantee. The same principle had prevailed with respect to mortgages until this time. But, by this law, no time is specified within which they shall be recorded; that is at the election of the mortgagee. It is prescribed, however, that they shall take effect from the time of recording. What means all this? Was it done without design, through mere carelessness, or want of attention? It is evident that a change in the law was intended. It was thought that there was

some mischief in the previous law, and the object was to supply a remedy; and that mischief was, as we must suppose, from the course of legislation, that a man might take a mortgage of his neighbor's property, and keep it concealed for six months, thereby enabling that neighbor to contract further debts, which he would be unable to pay, and thereby defraud the community around him. To remedy evils of this character, the law-making power thought it good policy to provide that this species of conveyance should only take effect from the time of recording — from the time that notice was given of the encumbrance upon the public records of the county. Whether the policy was sound or not, is not for us to say. It is sufficient for us to know that such is the policy. But we, in fact, believe that the policy is good, and if persevered in, will tend to prevent, and actually will prevent, frauds. We have no doubt that, under this construction, frauds may be practised and hard cases arise. The case before the court is a hard one. Anna Parker sold her land, and took a mortgage to secure the purchase money; she neglected to place this mortgage upon record. She may, in consequence, lose the debt, but it will not do to bend the law to prevent its operation against her.

But, as between ordinary mortgages, I cannot perceive how this construction can operate improperly. I know it is said that a subsequent mortgagee, with notice, defrauds the prior mortgagee by putting his mortgage first upon record. In one sense of the word, perhaps he does, but there is no actual fraud. Take an instance: A. and B. are creditors of C.; the debts are equal, and either is sufficient to sweep away the entire property of the debtor; A. seeks his opportunity, and for the security of his debt, procures a mortgage upon the entire property of C.; when he does it, he knows of the debt of B., and knows, further, that his mortgage will entirely defeat the collection of that debt. Now, in the common acceptation of the term, and according to the ideas of the profession, here is no fraud. True, B. is deprived of the collection of his debt, but there is no fraud. A. is the vigilant creditor; he only took the mortgage to secure what was honestly his due. But change the case: A. after having procured his mortgage, becomes negligent, he does not place it upon record; B., knowing the existence of that mortgage, but equally anxious to secure his debt, procures a mortgage, and places it upon record. All cry out, here is a fraud. Now, my perceptions are so obtuse, that I can perceive no difference, in a moral point of view, in the actions of these two men. They are both creditors, and both equally anxious to secure their debts. They pursue the course pointed out by law to effect their object. The one is the most vigilant to get his mortgage executed: the other, to get his recorded. The course of neither is in accordance with the principles of abstract justice. Such justice would require that, inasmuch as the property was not sufficient to pay both, it should be equally divided between them.

It is attempted, in this case, to set up the vendor's lien for the protection of Mrs. Parker. This can be done only where it appears that

the vendor relied upon this lien as security for the payment of the purchase money. In this case, a note, with personal security, was given for the purchase money in the first instance, and subsequently a mortgage.

It is urged by counsel, that although as between mortgages, the first recorded mortgage must prevail, yet that an unrecorded mortgage, being in equity a specific lien, must prevail as against a prior judgment lien, which is general. If we are right in the construction of the Statute, if a mortgage does not take effect until recorded; in other words, if the recording is part and parcel of the execution, it is difficult to see how this position can be sustained. If, as we suppose, the leading motive of the Legislature, in the enactment of the law, was to have encumbrance upon land placed upon the record of the county, to adopt the principle insisted upon, would be to defeat that intention. The case of *Lake* v. *Doud*, 10 Ohio Rep. 415, is cited in support of the position assumed by defendant's counsel. In that case, there was no judgment lien. The judgment had been rendered in a county different from the one in which the land in controversy was situated. But execution had been levied upon the land in controversy, and it had been sold. The purchaser did not set up any claim against the mortgage. The great question in the case was a question of fraud, and the court found, not that there was constructive fraud, but that an actual and aggravated fraud had been attempted upon the rights of the complainants. The question was made by defendants, whether the deed of the complainant would be enforced, not being a legal mortgage; and the court held that it could, and cited, as authority, the case of the *Bank of Muskingum* v. *Carpenter*, 7 Ohio Rep. 21. The case in 7th Ohio was undoubtedly correctly decided, but the mortgage in controversy, in that case, was executed long before the Act of 1831.

In the case of *Lake* v. *Doud*, this latter Act was scarcely taken into consideration by the court. The great, the leading question, as before stated, being the question of fraud.

The case of *Magee* v. *Bell, Administrator of Beatty*, 8 Ohio Rep. 396, was one in which the question as to priority of lien was raised. The plaintiff was a judgment creditor of Thos. T. Beatty; the intestate was a creditor whose debt was secured by mortgage. The mortgage was delivered for record, before the first day of the term, when the judgment was entered, but was not copied into the record until afterwards. When the case was first under consideration, the question was, whether the mortgage should take effect from the time of its delivery for record, or from the time it was actually copied into the record. If from the time of delivery for record, the mortgage in the case then before the court, was to be preferred to the judgment. If from the time it was actually copied into the record, then the lien of the judgment was the preferable lien. Upon this question, the court divided in opinion, and this division of opinion induced the Legislature to pass the declaratory Act of March, 1838. In that case, it is evident that the court con-

sidered that the lien of a judgment must be preferred to any lien of an unrecorded mortgage.

Upon the whole, the court are of opinion that the judgment of Kaglor is the preferable lien upon the one hundred acres of land, and that the mortgage of the complainant must be preferred to that of Anna Parker. As we suppose the case was reserved for the purpose of settling this point, we shall not now enter a final decree, nor order a sale of the mortgaged premises; but the case will be referred to a master, to ascertain the amount due upon the respective liens, with instructions to report at the next term of the court in Clermont County.

In making this inquiry, the master will examine the complainant on oath, touching the consideration of the debt secured by his mortgage. In the answer of Anna Parker, she charges that much of the consideration of this note is exorbitant interest, such exorbitant interest being compounded; and she calls upon complainant, by interrogatories, to answer this charge. This he refuses to do, and, as he says, under the advice of counsel, that he is not obliged to do it. We differ from counsel on this point; the interrogatories must be answered, or what will result in the same thing, the complainant must answer on oath before the master.[1]

SECTION VII.

WHAT IS NOTICE.

POMROY *v.* STEVENS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1846.

[*Reported* 11 *Met.* 244.]

WRIT of entry to recover forty-three acres of land in Hancock. At the trial before *Shaw*, C. J., both parties claimed title to the demanded premises under Hiram Chapman. The demandant claimed under a levy upon the premises, made on the 8th of November, 1842, upon an execution against said Chapman, in pursuance of an attachment alleged to have been made on the 6th of December, 1841. The tenant claimed under a deed of the premises, made to him by said Chapman, on the 4th day of February, 1839, acknowledged on the same day, and recorded on the 10th of December, 1842.

Several objections (which need not be here stated) were made to the legality and sufficiency of the demandant's said levy, which were overruled by the judge.

[1] See *Bercaw* v. *Cockerill*, 20 Ohio St. 163 (1870).

An objection was then made to the demandant's attachment of the demanded premises, on the ground of a discrepancy between the officer's return thereof on the original writ and his return on the copy deposited in the clerk's office and entered in the clerk's book, pursuant to Rev. Sts. c. 90, §§ 28–30. The attachment on the writ purported to be made on the 7th of December, 1841, whereas, on said copy, it was stated to be on the 6th of said December. The judge ruled, *first*, that this slight misdescription of the attachment did not raise a doubt of its identity, nor affect any one's rights; and *secondly*, that, as the tenant did not claim under any subsequent conveyance or attachment, by the terms of the Statute he could not take advantage of such misdescription.

The defence was, that the demandant, when he made his levy, and when he made his attachment, had actual notice of the tenant's prior unrecorded deed. In support of this defence, the tenant offered evidence to show that he was in the open occupation and possession of the demanded premises; that he pastured part thereof, and cultivated other parts thereof; and that this was so open and visible as to warrant a belief that the demandant knew it. This evidence was objected to as incompetent, having no tendency to prove knowledge of a pre-existing title by deed, rather than a tenancy for years or at will. Whereupon the judge ruled, that such acts of occupation and improvement were not competent evidence, unless connected with some admission or declaration of the demandant, showing that he attributed such acts to the existence of a previous conveyance.

The tenant then proposed to prove some improvements of a more expensive and permanent character, such as an owner only would be likely to make; and for this purpose he offered to prove that he joined with a neighbor who had purchased another part of said Hiram Chapman's land, and put his deed on record, in building a partition rail fence, of considerable extent. But the judge ruled, that such fencing fell under the rule before stated, in regard to possession, occupation, and improvement, and had no tendency to prove a pre-existing deed.

The tenant's counsel declined going to the jury upon the question of fact, and consented to a verdict for the demandant, subject to the opinion of the whole court upon the rulings at the trial.

Bishop, for the tenant.

Rockwell, for the demandant.

WILDE, J. The parties in this case both claim their titles under Hiram Chapman; and the general question is, which party has the better title.

The tenant claims under a deed dated February 4th, 1839, acknowledged the same day, but not recorded until the 10th of December, 1842. The demandant claims under a levy of an execution, alleged to have been made on the 8th of November, 1842, in pursuance of an attachment alleged to have been made on the 6th of December, 1841.

Several objections were taken, at the trial, to the legality of the

demandant's levy; but they were all overruled, and no exceptions were taken to the ruling of the court in this respect. An objection was also made to the validity of the attachment, on the ground that in the copy left at the clerk's office there was a misdescription as to the day when the attachment was made; the attachment purporting to have been made on the 7th of December, and in the clerk's book it was stated to be on the 6th of December. But this objection is immaterial, as the tenant was a *previous* purchaser, and could not have been prejudiced by this slight mistake. The Rev. Sts. *c.* 90, § 28, provide that "no attachment of real estate, on mesne process, shall be valid against any subsequent attaching creditor, or against any person who shall afterwards purchase the same," &c. "unless the original writ or a copy thereof, and so much of the officer's return thereon as relates to the attachment of such estate, shall be deposited in the office of the clerk of the court," &c. This provision is made for the benefit of *subsequent* purchasers and attaching creditors, and by them only can advantage be taken of any non-compliance therewith.

The remaining objection to the demandant's title is that on which the tenant principally relies. He contends, that at the time of the demandant's attachment and the levy of his execution, the demandant had actual notice of the tenant's prior title; and he offered evidence to prove that, before the attachment, he was in the open and visible possession of the demanded premises, cultivating the same, and making improvements of a permanent character thereon; and he contended that this was competent and sufficient evidence to warrant the jury in finding that the demandant had actual notice of the tenant's title. But the presiding judge was of a different opinion, and ruled accordingly. Whether the demandant had notice of the tenant's title or not, was a question of fact for the jury to decide. But the competency and sufficiency of the evidence to prove the fact were within the province of the court to determine; and we are all of opinion that the ruling of the presiding judge on this point was well founded.

Before the Rev. Sts. *c.* 59, § 28, the open and notorious possession and improvement of real estate, by a party entering under a deed not registered, was, in general, sufficient evidence from which notice of such deed might be inferred or implied, so as to avoid a subsequent deed or attachment. But to have that effect, the evidence must have been such as to render the inference not merely probable, but necessary and unquestionable. *M'Meehan* v. *Griffing*, 3 Pick. 149. But since the Rev. Sts. *c.* 59, § 28, no implied or constructive notice of an unregistered deed can avoid a subsequent deed or attachment. The Statute expressly provides that no conveyance of real estate shall be valid and effectual, against any person other than the grantor and his heirs and devisees, and persons having actual notice thereof, unless it is made by a deed recorded as the Statute directs. Since this provision, no implied or constructive notice of an unregistered deed will give it validity against a subsequent purchaser or attaching creditor. It is not suffi-

cient to prove facts that would reasonably put him on inquiry. He is not bound to inquire; but the party relying on an unregistered deed, against a subsequent purchaser or attaching creditor, must prove that the latter had actual notice or knowledge of such deed. The evidence offered was clearly insufficient to prove any such notice or knowledge. A tenant for years, or at will, may have possession of real estate, and may build fences, and make other improvements thereon; or a party may have possession, and make improvements, without any title by deed or by lease.

The evidence of such possession and improvements is wholly insufficient to prove that the party in possession holds under a conveyance to him in fee simple. The evidence offered, therefore, would not have warranted the inference that the demandant had any notice or knowledge of the tenant's title-deed.

Judgment on the verdict.

WILLIAMSON *v.* BROWN.

Court of Appeals of New York. 1857.

[*Reported* 15 *N. Y.* 354.]

The defendant, Brown, was the owner of fifty acres of land in Hannibal, Oswego County, which, on the 4th of April, 1851, he sold and conveyed to one Jackson Earl, taking back from Earl a mortgage for $800 of the purchase money, but omitting at that time to put his mortgage upon record.

On the 29th of October, 1851, Earl conveyed the land to the plaintiff by deed, which was duly recorded on the same day; and on the 28th of January, 1852, the mortgage from Earl to the defendant was put upon record. In May following the defendant commenced proceedings for the foreclosure of the mortgage by advertisement. This suit was commenced to restrain the defendant from proceeding with this foreclosure, on the ground that the plaintiff was protected by the Recording Act against the defendant's prior but unrecorded mortgage.

The cause was tried before a referee, who reported that he found as matter of fact "that the plaintiff did not at the time he purchased the premises have actual notice of the existence of the mortgage mentioned in the pleadings, given by Jackson Earl to the defendant," but also found that he had "sufficient information, or belief of the existence of said mortgage to put him upon inquiry, before he purchased and received his conveyance of the premises in question; and that he pursued such inquiry to the extent of his information and belief, as to the existence of the said mortgage, and did not find that such mortgage existed, or had been given."

Upon these facts the referee held that the plaintiff was chargeable with notice of the mortgage, and dismissed the complaint, and the plaintiff excepted to the decision. Judgment was entered for the defendant upon the referee's report, which upon appeal to the General Term of the Fifth District, was affirmed.

D. H. Marsh, for the appellant.

J. R. Lawrence, for the respondent.

SELDEN, J. The referee's report is conclusive as to the facts. It states, in substance, that the plaintiff had sufficient information to put him upon inquiry as to the defendant's mortgage; but that after making all the inquiry, which upon such information it became his duty to make, he failed to discover that any such mortgage existed. This being, as I think, what the referee intended to state, is to be assumed as the true interpretation of his report.

The question in the case, therefore is, as to the nature and effect of that kind of notice so frequently mentioned as notice sufficient to put a party upon inquiry. The counsel for the plaintiff contends that while such a notice may be all that is required in some cases of equitable cognizance, it is not sufficient in cases arising under the Registry Acts, to charge the party claiming under a recorded title with knowledge of a prior unregistered conveyance. He cites several authorities in support of this position.

In the case of *Dey* v. *Dunham*, 2 John. Ch. R. 182, Chancellor Kent says, in regard to notice under the Registry Act: "If notice that is to put a party upon inquiry be sufficient to break in upon the policy and the express provisions of the Act, then indeed, the conclusion would be different; but I do not apprehend that the decisions go that length." Again, in his Commentaries, speaking on the same subject, he says: "Implied notice may be equally effectual with direct and positive notice; but then it must not be that notice which is barely sufficient to put a party upon inquiry."

So in *Jackson* v. *Van Valkenburg*, 8 Cow. 260, Woodworth, J., says: "If these rules be applied to the present case, the notice was defective. It may have answered to put a person on inquiry, in a case where that species of notice is sufficient; but we have seen that to supply the place of registry, the law proceeds a step further."

A reference to some of the earlier decisions under the Registry Acts of England will tend, I think, to explain these remarks, which were probably suggested by those decisions. One of the earliest, if not the first of the English Recording Acts was that of 7 Anne, *ch.* 20. That Act differed from our General Registry Act in one important respect. It did not, in terms require, that the party to be protected by the Act should be a *bona fide* purchaser. Its language was: "And that every such deed or conveyance, that shall at any time after, &c., be made and executed, shall be adjudged fraudulent and void, *against any subsequent purchaser or mortgagee for valuable consideration*, unless," &c.

The English judges found some difficulty at first in allowing any equity, however strong, to control the explicit terms of the Statute. It was soon seen, however, that adhering to the strict letter of the Act would open the door to the grossest frauds. Courts of equity, therefore, began, but with great caution, to give relief when the fraud was palpable. *Hine* v. *Dodd*, 2 Atk. 275, was a case in which the complainant sought relief against a mortgage having a preference under the Registry Act, on the ground that the mortgagee had notice. Lord Hardwicke dismissed the bill, but admitted that "apparent fraud, or *clear and undoubted* notice would be a proper ground of relief." Again he said: "There may possibly have been cases of relief upon notice, divested of fraud, but then the proof must be *extremely clear*."

Jolland v. *Stainbridge*, 3 Ves. 478, is another case in which relief was denied. The Master of the Rolls, however, there says: "I must admit *now* that the registry is not conclusive evidence, but it is equally clear that it must be *satisfactorily proved*, that the person who registers the subsequent deed must have known *exactly* the situation of the persons having the prior deed, and knowing that, registered in order to defraud them of that title."

Chancellor Kent refers to these cases in *Dey* v. *Dunham* (*supra*), and his remarks in that case, as to the effect, under the Registry Acts, of notice sufficient to put a party upon inquiry, were evidently made under the influence of the language of Lord Hardwicke and the Master of the Rolls above quoted.

But the English courts have since seen, that if they recognized any equity founded upon notice to the subsequent purchaser of the prior unregistered conveyance, it became necessarily a mere question of good faith on the part of such purchaser. They now apply, therefore, the same rules in regard to notice, to cases arising under the Registry Acts, as to all other cases.

It will be sufficient to refer to one only among the modern English cases on this subject, viz., *Whitbread* v. *Boulnois*, 1 You. & Coll. Ex. R. 303. The plaintiff was a London brewer, and supplied Jordan, who was a publican, with beer. It was the common practice with brewers in London to lend money to publicans whom they supplied with beer, upon a deposit of their title deeds. Jordan had deposited certain deeds with the plaintiff, pursuant to this custom. He afterwards gave to one Boulnois, a wine merchant, a mortgage upon the property covered by the deeds deposited, which was duly recorded. Boulnois had notice of Jordan's debt to the plaintiff, and of the existing custom between brewers and publicans, but he made no inquiry of the brewers. The suit was brought to enforce the equitable mortgage arising from the deposit. Baron Alderson held that the notice to Boulnois was sufficient to make it his duty to inquire as to the existence of the deposit; that his not doing so was evidence of bad faith, and the plaintiff's right, under his equitable mortgage, was sustained. No case could

show more strongly that notice which puts the party upon inquiry is sufficient even under the Registry Act.

The cases in our own courts, since *Day* v. *Dunham* and *Jackson* v. *Van Valkenburgh* (*supra*), hold substantially the same doctrine. *Tuttle* v. *Jackson*, 6 Wend. 213; *Jackson* v. *Post*, 15 Wend. 588; *Grimstone* v. *Carter*, 3 Paige, 421.

I can see no foundation in reason for a distinction between the evidence requisite to establish a want of good faith, in a case arising under the Recording Act, and in any other case; and the authorities here referred to are sufficient to show that no such distinction is recognized, at the present day, by the courts. The question, however, remains, whether this species of notice is absolutely conclusive upon the rights of the parties. The plaintiff's counsel contends, that knowledge sufficient to put the purchaser upon inquiry is only presumptive evidence of actual notice, and may be repelled by showing that the party did inquire with reasonable diligence, but failed to ascertain the existence of the unregistered conveyance; while, on the other hand, it is insisted that notice which makes it the duty of the party to inquire, amounts to constructive notice of the prior conveyance, the law presuming that due inquiry will necessarily lead to its discovery.

The counsel for the defendant cites several authorities in support of his position, and among others the cases of *Tuttle* v. *Jackson* and *Grimstone* v. *Carter* (*supra*). In the first of these cases, Walworth, Chancellor, says: "If the subsequent purchaser knows of the unregistered conveyance, at the time of his purchase, he cannot protect himself against that conveyance; and whatever is sufficient to make it his duty to inquire as to the rights of others, is considered legal notice to him of those rights;" and in *Grimstone* v. *Carter*, the same judge says: "And if the person claiming the prior equity is in the actual possession of the estate, and the purchaser has notice of that fact, it is sufficient to put him on inquiry as to the actual rights of such possessor, and is good constructive notice of those rights."

It must be conceded that the language used by the learned Chancellor in these cases, if strictly accurate, would go to sustain the doctrine contended for by the defendant's counsel. Notice is of two kinds: actual and constructive. Actual notice embraces all degrees and grades of evidence, from the most direct and positive proof to the slightest circumstance from which a jury would be warranted in inferring notice. It is a mere question of fact, and is open to every species of legitimate evidence which may tend to strengthen or impair the conclusion. Constructive notice, on the other hand, is a legal inference from established facts; and like other legal presumptions, does not admit of dispute. "Constructive notice," says Judge Story, "is in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted." Story's Eq. Juris. § 399.

A recorded deed is an instance of constructive notice. It is of no

consequence whether the second purchaser has actual notice of the prior deed or not. He is bound to take, and is presumed to have, the requisite notice. So, too, notice to an agent is constructive notice to the principal; and it would not in the least avail the latter to show that the agent had neglected to communicate the fact. In such cases, the law imputes notice to the party whether he has it or not. Legal or implied notice, therefore, is the same as constructive notice, and cannot be controverted by proof.

But it will be found, on looking into the cases, that there is much want of precision in the use of these terms. They have been not unfrequently applied to degrees of evidence barely sufficient to warrant a jury in inferring actual notice, and which the slightest opposing proof would repel, instead of being confined to those legal presumptions of notice which no proof can overthrow. The use of these terms by the Chancellor, therefore, in *Tuttle* v. *Jackson* and *Grimstone* v. *Carter*, is by no means conclusive.

The phraseology uniformly used, as descriptive of the kind of notice in question, "sufficient to put the party upon inquiry," would seem to imply that if the party is faithful in making inquiries, but fails to discover the conveyance, he will be protected. The import of the terms is, that it becomes the duty of the party to inquire. If, then, he performs that duty is he still to be bound, without any actual notice? The presumption of notice which arises from proof of that degree of knowledge which will put a party upon inquiry is, I apprehend, not a presumption of law, but of fact, and may, therefore, be controverted by evidence.

In *Whitbread* v. *Boulnois* (*supra*), Baron Alderson laid down the rule as follows: "When a party having knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries, does not make, but on the contrary studiously avoids making, such obvious inquiries, he must be taken to have notice of those facts, which, if he had used such ordinary diligence, he would readily have ascertained." This very plainly implies that proof that the party has used due diligence, but without effect, would repel the presumption. In this case, it is true, the decision was against the party having the notice. But in *Jones* v. *Smith*, 1 Hare, 43, we have a case in which a party, who had knowledge sufficient to put him on inquiry, was nevertheless held not bound by the notice.

The defendant had loaned money upon the security of the estate of David Jones, the father of the plaintiff. At the time of the loan he was informed, by David Jones and his wife, that a settlement was made previous to the marriage, but was at the same time assured that it only affected the property of the wife. He insisted upon seeing the settlement, but was told that it was in the hands of a relative, and that it could not be seen without giving offence to an aged aunt of the wife, from whom they had expectations. David Jones, however, after some further conversation, promised that he would try to procure it for exhibition to the defendant. This promise he failed to perform. It turned

out that the settlement included the lands upon which the money was loaned. Here was certainly knowledge enough to put the party upon inquiry; for he was apprised of the existence of the very document which was the foundation of the complainant's claim. He did inquire, however, and made every reasonable effort to see the settlement itself, but was baffled by the plausible pretences of David Jones. The Vice-Chancellor held the notice insufficient. He said: "The affairs of mankind cannot be carried on with ordinary security, if a doctrine like that of constructive notice is to be refined upon until it is extended to cases like the present."

Possession by a third person, under some previous title, has frequently but inaccurately been said to amount to constructive notice to a purchaser, of the nature and extent of such prior right. Such a possession puts the purchaser upon inquiry, and makes it his duty to pursue his inquiries with diligence, but is not absolutely conclusive upon him. In *Hanbury* v. *Litchfield*, 2 Myl. & Keene, 629, when the question arose, the Master of the Rolls said: "It is true that when a tenant is in possession of the premises, a purchaser has implied notice of the nature of his title; but if, at the time of his purchase, the tenant in possession is not the original lessee, but merely holds under a derivative lease, and has no knowledge of the covenants contained in the original lease, it has never been considered that it was want of due diligence in the purchaser, which is to fix him with implied notice, if he does not pursue his inquiries through every derivative lessee until he arrives at the person entitled to the original lease, which can alone convey to him information of the covenants."

This doctrine is confirmed by the language of Judge Story, in *Flagg* v. *Mann et al.*, 2 Sumner, 554. He says: "I admit that the rule in equity seems to be, that where a tenant or other person is in possession of the estate at the time of the purchase, the purchaser is put upon inquiry as to the title; and *if he does not inquire*, he is bound in the same manner as if he had inquired, and had positive notice of the title of the party in possession."

It is still further confirmed by the case of *Rogers* v. *Jones*, 8 N. Hamp. 264. The language of Parker, J., in that case, is very emphatic. He says: "To say that he (the purchaser) was put upon inquiry, and that having made all due investigation, without obtaining any knowledge of title, he was still chargeable with notice of a deed, if one did really exist, would be absurd."

If these authorities are to be relied upon, and I see no reason to doubt their correctness, the true doctrine on this subject is, that where a purchaser has knowledge of any fact, sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a *bona fide* purchaser. This presumption, however, is a mere inference

of fact, and may be repelled by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of proper diligence on his part.

The judgment should be reversed, and there should be a new trial, with costs, to abide the event.

PAIGE, J. The question to be decided is, whether under the finding of the referee, the plaintiff is to be deemed to have had at the time of his purchase, legal notice of the prior unrecorded mortgage of the defendant. The referee finds that the plaintiff had sufficient information or belief of the existence of such mortgage to put him upon inquiry; but that upon pursuing such inquiry to the extent of such information and belief, he did not find that such mortgage existed or had been given. It seems to me that the two findings are inconsistent with each other. If the plaintiff on pursuing an inquiry to the full extent of his information and belief as to the existence of the defendant's mortgage, was unable to find that it either then existed or had been given, the highest evidence is furnished that the information received or belief entertained by the plaintiff was not sufficient to put him on inquiry as to the existence of such mortgage. The last part of this finding effectually disproves the fact previously found of the sufficiency of notice to put the plaintiff on inquiry. The two facts are utterly inconsistent with each other, and cannot possibly coexist.

The remarks of Parker, Justice, in *Rogers* v. *Jones*, 8 N. Hamp. 264, 269, are directly apposite to the facts found by the referee. Judge Parker says: "To say that he (demandant), was put upon inquiry, and that having made all due investigation without obtaining any knowledge of title, he was still chargeable with notice of a deed, if one did really exist, would be absurd." The sound sense of these observations is clearly shown by the principle of the rule that information sufficient to put a party upon inquiry is equivalent to evidence of actual notice, or to direct and positive notice. That principle is, that such information will, if followed by an inquiry prosecuted with due diligence, lead to a knowledge of the fact with notice of which the party is sought to be charged. Hence, in all cases where the question of implied notice of a prior unrecorded mortgage or conveyance arises as a question of fact to be determined, the court must decide whether the information possessed by the party would, if it had been followed up by proper examination, have led to a discovery of such mortgage or conveyance. If the determination is that such an examination would have resulted in a discovery of the mortgage or conveyance, the conclusion of law necessarily results that the information possessed by the party amounted to implied notice of such instrument. But if the determination is the converse of the one stated, the information of the party cannot be held to be an implied notice of the deed or mortgage. These propositions will be found to be fully sustained by authority. *Kennedy* v. *Green*, 3 Myl. & Keene, 699; 2 Sugden on Vendors, &c., 552, Am. ed. of 1851, marg. page 1052; 4 Kent's Com. 172; *Howard*

Ins. Co. v. *Halsey*, 4 Sandf. S. C. R. 577, 578; same case, 4 Seld. 274, 275; 1 Story's Eq. Jur. §§ 398–400, 400 *a*; *Jackson* v. *Burgott*, 10 John. 461; *Dunham* v. *Dey*, 15 John. 568, 569, in error; *Jackson* v. *Given*, 8 John. 137; *Jolland* v. *Stainbridge*, 3 Ves. 478; *Pendleton* v. *Fay*, 2 Paige, 205. Where the information is sufficient to lead a party to a knowledge of a prior unrecorded conveyance, a neglect to make the necessary inquiry to acquire such knowledge, will not excuse him, but he will be chargeable with a knowledge of its existence; the rule being that a party in possession of certain information will be chargeable with a knowledge of all facts which an inquiry, suggested by such information, prosecuted with due diligence, would have disclosed to him. 4 Sandf. S. C. R. 578; 3 Myl. & Keene, 699. In this case the fact being found by the referee, that the plaintiff after pursuing an inquiry to the extent of his information, failed to discover the existence of the defendant's mortgage, it seems to me that neither law nor justice will justify us in holding the plaintiff chargeable with implied notice of such mortgage. The doctrine of notice and its operation in favor of a prior unrecorded deed or mortgage rests upon a question of fraud, and on the evidence necessary to infer it. 4 Kent's Com. 172. Actual notice affects the conscience, and convicts the junior purchaser of a fraudulent intent to defeat the prior conveyance. His knowledge of facts and circumstances at the time of the second purchase sufficient to enable him on due inquiry to discover the existence of the prior conveyance, is evidence from which a fraudulent intent may be inferred. 15 John. 569; 2 John. Ch. R. 190; *Jackson* v. *Burgott*, 10 John. 462. Now if it is ascertained and found as a fact, that the facts and circumstances within the knowledge of the second purchaser, at the time of his purchase, were insufficient to lead him, on a diligent examination, to a discovery of the prior conveyance, how upon this finding can a fraudulent intent be inferred, and if not, how can he be charged with notice, which implies a fraudulent intent? It is not in the nature of things, that a knowledge of the same facts and circumstances, shall at one and the same time, be held evidence of both innocence and guilt. I think the rule well established that an inference of a fraudulent intent on the part of a junior purchaser or mortgagee, must in the absence of actual notice, be founded on clear and strong circumstances, and that such inference must be necessary and unquestionable. *McMechan* v. *Griffing*, 3 Pick. 149, 154, 155; *Hine* v. *Dodd*, 2 Atk. 275; *Jackson* v. *Given*, 8 John. 137; 2 Mass. 509; 2 John. Ch. R. 189; 15 John. S. C. 569; 8 Cow. 264, 266.

For the above reasons, both the judgment rendered on the report of the referee, and the judgment of the General Term affirming the same, should be reversed, and a new trial should be granted.

All the judges concurred in the result of the foregoing opinions except COMSTOCK and BROWN, who, not having heard the argument, took no part in the decision.

New trial ordered.

GEORGE *v.* KENT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1863.

[*Reported* 7 *Allen*, 16.]

BILL in equity to redeem land from a mortgage.

It appeared at the hearing that on the 7th of May, 1850, Nathaniel Chessman, being the owner of a parcel of land on the south side of Water Street in Milford, containing about three acres, mortgaged it to Maxcy Cook; that afterwards, on the 1st of July, 1853, he conveyed a small lot on the easterly part thereof to Hugh Galliher, by a deed of warranty which was duly recorded; that afterwards, on the 5th of June, 1854, he conveyed a small lot on the westerly part thereof to Patrick Murphy, by a deed of warranty which was not recorded; and that afterwards, on the 2d of November, 1854, he conveyed another small lot, lying between the lots conveyed to Galliher and Murphy, to the plaintiff, by a deed of mortgage which was duly recorded, containing the following description of the mortgaged premises: "Beginning at the northeasterly corner of the premises, on Water Street, on land of Hugh Galliher; thence S. 2° W. by land of said Galliher eight rods; thence S. 87¼° W. five and one half rods to land of Patrick Murphy, bounding southerly on land of N. Chessman; thence N. 2° E. eight rods to said street, bounding westerly on land of said Murphy; thence easterly by said street five and one half rods to the place of beginning." The mortgage to Maxcy Cook was assigned to the defendants in February, 1861; and in May, 1861, they commenced an action against the plaintiff to foreclose it, describing in their writ the lot conveyed to the plaintiff, and no more, and obtained a conditional judgment in February, 1862, for the sum of $1,679.15. In April, 1861, the lot conveyed to Murphy became vested in the defendant Kent by mesne conveyances.

The plaintiff contended that the Murphy lot should be held to contribute, in proportion to its value, towards the redemption of the Cook mortgage; and the case was reserved by *Chapman*, J., for the determination of the whole court.

P. C. Bacon, P. E. Aldrich with him, for the plaintiff.

G. F. Hoar, for the defendants.

CHAPMAN, J. It is not denied that the plaintiff has a right to redeem on payment of the amount for which conditional judgment was rendered; but he claims the right on payment of a less sum. He insists that as his deed was a deed of warranty, and was made and recorded, while the deed to Murphy was unrecorded, he has a right to hold the Murphy lot liable to contribute to the payment of the Cook mortgage. This position would be correct if there were no other facts to affect it. But the defendants reply that he had notice of the deed to Murphy. The

fact relied on to prove such notice is, that Murphy's lot adjoins him on the west, and in his deed he is bounded westerly on land of Patrick Murphy. The court are of opinion that this was sufficient notice of Murphy's title. Before the enactment of Rev. Sts. *c.* 59, § 28, actual notice of an unrecorded deed was not necessary; and circumstantial evidence of title was held to be sufficient. But the Rev. Sts. made a change in this respect, and required that there should be actual notice. *Curtis* v. *Mundy*, 3 Met. 405. *Pomroy* v. *Stevens*, 11 Met. 244. *Mara* v. *Pierce*, 9 Gray, 306. *Parker* v. *Osgood*, 3 Allen, 487. The case of *Curtis* v. *Mundy* is, to some extent, overruled by the later cases; yet none of them hold it to be necessary that the notice shall be by actual exhibition of the deed. Intelligible information of a fact, either verbally or in writing, and coming from a source which a party ought to give heed to, is generally considered as notice of it, except in cases where particular forms are necessary. In this case no particular form is necessary. The description of the land in the plaintiff's deed was equivalent to an affirmation of his grantor that the land lying west of it was owned by Patrick Murphy, by virtue of some proper instrument of conveyance. He knew from this information that Murphy's title was prior to his own. Having such a title, and the plaintiff having notice of it, Murphy and his grantees are not liable to contribute towards the redemption of the Cook mortgage. *Chase* v. *Woodbury*, 6 Cush. 143. *Bradley* v. *George*, 2 Allen, 392.

The plaintiff is entitled to redeem on payment of the amount of the conditional judgment against him, with interest, deducting rents and profits received.

MAUPIN *v.* EMMONS.

SUPREME COURT OF MISSOURI. 1871.

[*Reported* 47 *Mo.* 304.]

Ewing and *Smith*, for plaintiffs in error.

Lay and *Belch*, for defendants in error.

BLISS, J., delivered the opinion of the court.

The plaintiffs brought their action for the possession of 320 acres of land owned and occupied by defendants, and relied upon a sale and purchase by them upon execution against one Hammack, the grantor of defendant Emeline Emmons. The execution sale was on the 20th of April, 1864, and the sheriff's deed was made on the 20th of September following, and placed on record the 29th. Hammack, the execution debtor, had sold the property and conveyed the same to Emeline Emmons, wife of the other defendant, on the 16th of November, 1858, and received a full consideration therefor. But the purchasers failed

to put their deed upon record until after the sheriff's sale and the record of the sheriff's deed, although they went into immediate possession of the property, have ever since resided thereon, and have made valuable improvements. One of the plaintiffs, on examining the records, and finding that defendant's deed was not recorded, directed the sheriff to levy upon the property, and at the sale bid it in for a nominal consideration. It is one of those attempts, generally unsuccessful, though too often otherwise, to take advantage of the negligence of those who rest secure in the possession of their property, and to transfer it to those who are watching for opportunities to prey upon the unwary.

The case was submitted to the court, and the defendants recovered judgment. I need not consider in detail the numerous declarations of law given and refused, but the record shows a full and fair trial, and that no other result could have been reached. The effect of a failure to place upon record one's title-deeds has often been considered by this court, and it has always been held here, as elsewhere, that, as between the purchaser and his vendor, it is of no importance that the deed be recorded at all. The same is held as between the holder of the first conveyance and subsequent purchasers from the same vendor, if they purchase with notice of the original conveyance, or if their purchase was not made upon payment of a good and valuable consideration. The payment of the consideration raises the equity that invalidates the first deed. *Paul* v. *Fulton*, 25 Mo. 156; *Aubuchon* v. *Bender*, 44 Mo. 560. The Statute invalidating the original unrecorded deed is held to operate in favor of *bona fide* purchasers at sheriffs' as well as private sales, provided the original deed be not recorded until after the sale. *Davis* v. *Ownsby*, 14 Mo. 170; *Draper* v. *Bryson*, 17 Mo. 71, and 26 Mo. 108; *Valentine* v. *Havener*, 20 Mo. 133; *Reed* v. *Ownby*, 44 Mo. 204. But differences have often arisen as to what constitutes the notice spoken of in the Statute.

The following is the section declaring the effect upon the unrecorded instrument of a failure to file for record: "Sec. 26. No such instrument in writing shall be valid except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record."

The actual notice required by the Statute is used in contradistinction to the constructive notice given by a record. It does not mean that there must necessarily be direct and positive evidence that the subsequent purchaser actually knew of the existence of the deed. Any proper evidence tending to show it — facts and circumstances coming to his knowledge that would put a man of ordinary circumspection upon inquiry — should go to the jury as evidence of such notice. The second sale by one who has already conveyed the property is necessarily fraudulent; and if it appears in evidence that the purchaser knows that the holder of the unrecorded deed is in possession of the property as owner, or that he is informed that such holder has bought

the property, the jury has a right to infer full knowledge or voluntary ignorance; and if he buy with such knowledge, or such means of knowledge, he becomes a party to the fraud, and will not be permitted to take advantage of it. In *Speck* v. *Riggin*, 40 Mo. 405, the court holds that "notice is actual where the purchaser either knows of the existence of the adverse claim or title, or is conscious of having the means of knowing, although he may not use them." And the majority of the court, *per* Leonard, J., in *Vaughn* v. *Tracy*, 22 Mo. 417, and 25 Mo. 318, holds that evidence of possession and apparent ownership, brought home to the knowledge of the second purchaser, should go to the jury, and ought to be deemed sufficient information "that the possessor is the owner in fee under a title derived from the former owner." Proof of actual knowledge of the existence of the former deed has never been held to be necessary; but the jury has the right to infer such knowledge from facts that would naturally suggest it, and from which the actual relation of the prior purchaser of the land might be reasonably inferred. The doctrine of Judge Scott, in *Beattie* v. *Butler*, 21 Mo. 313, was expressly disclaimed by his associates, and has never been sustained by this court.

It will be thus seen that the court committed no error in refusing to declare as law, at the instance of plaintiffs, that "actual notice consists in the fact that the purchaser of lands has the direct and positive information that there has been a former deed executed and delivered to some other person, or that there is some one in possession of the lands claiming title, which information must be brought home to the party purchasing," etc. The declaration would have substituted the necessity of actual knowledge for the statutory requirement of actual notice, and, besides, would have required a character and degree of evidence the party had no right to claim. Judge Bates, in commenting upon a similar instruction, says that "the specification of the character of the proof was erroneous. Notice is a fact to be proved, like other facts, by evidence direct or circumstantial." *Lemay* v. *Pouppenez*, 35 Mo. 71. The court, however, at plaintiffs' instance, did declare as law (and went as far as they had a right to claim) that unless one of the plaintiffs had the information or knowledge brought home to him that defendants were living upon the specified lands, claiming title, the plaintiffs should recover. Other declarations of law were given at the instance of the plaintiffs, and several rejected. Some of the latter were well enough as general propositions, but their substance was embraced in others, and they were not called for. From the declarations made and refused there can be no doubt as to the views of the law that inspired the action of the court, and in those views we concur. There was evidence, both direct and circumstantial, strongly tending to show that one of the plaintiffs — the one who did all the business, ordered the levy, and bid off the land — positively knew that defendants occupied the farm as owners. It satisfied, and was sufficient to satisfy, the court below that he knew all about it,

and that he never dreamed of levying upon the land until he was informed by the recorder that the deed had not been recorded.

It will be perceived that the court held that open and notorious possession by the grantee in the unrecorded deed as owner, was not of itself notice to subsequent purchasers, but required affirmative evidence that they knew of such possession. As judgment was given for defendant, it does not become necessary to consider that question. (See, upon this subject, 3 Washb. Real Prop., 3d ed., 283, 284, and cases cited; and remarks of Judge Scott in *Beattie* v. *Butler;* and of Judge Leonard in *Vaughn* v. *Tracy.*)

But even if the court committed an error upon the question of notice, the plaintiffs could take nothing by their purchase, for the reason that the sheriff had no authority to sell. The execution was issued under the Act of March 23, 1863, which required the clerk, in issuing new executions, to refer to the former ones, "and in case levies have been made, to recite such levies in such renewed executions, and authorize and command the officer to whom such renewed executions are directed to levy such renewed executions upon additional property, if the former levy shall be deemed insufficient to satisfy such executions."

The clerk issued an ordinary *venditioni exponas*, reciting the old levies and ordering the sale of what had been levied on, but left out entirely the command to levy upon additional property. That in dispute had not been included in the former levies, but the sheriff proceeds with this writ to levy upon and sell other property, including the defendant's farm. Thus the levy and sale were not in obedience to the command of the writ under which they were had. Counsel now claim that, inasmuch as it was the duty of the clerk to insert in the new execution a command to make new levies, the writ must be treated as having contained such command, and the sheriff was clothed with the same power as though it had been inserted.

This proposition runs counter to all our ideas of the powers and duties of sheriffs. It has always been considered that he was but the executive officer of the court, bound to obey its lawful commands, and, in executing a writ, that he must look to the face of it for the extent and boundary of his duties and his powers. It does not matter what writ might have been issued — to what writ the party was entitled by law if he had chosen to sue it out. When it is issued and placed in the officer's hands, his only duty is to see what are its commands, and if he finds them within the authority of the court he must obey them. But he cannot go beyond those commands, or question their regularity. If he is ordered merely to sell certain property, the order gives him no authority to seize and sell any other property. If the writ is merely a *fieri facias* he cannot under it sell property as having been seized under a former writ. If the clerk has not issued the proper process — that is, between him and the parties to the cause — the sheriff cannot correct their errors. These principles are so elementary, so universally received and acted upon, as never to be disputed.

Counsel have cited us to *Towner* v. *Purkey*, 1 Con. Court, S. C., 323, where an execution was amended in a material part by correcting a clerical error, and claim that the omission in the present case was but a clerical mistake and should be disregarded. But it was much more than a clerical mistake; it was a total omission of the *fieri facias* portion of the writ. As issued, it was in substance but the well-known writ of *venditioni exponas;* and the omission of the additional power to make new levies, authorized by the Statute as well as the common law, was not a clerical mistake, but a neglect by the party in interest to sue out the double writ to which he was entitled.

The judgment of the District Court, affirming that of the Circuit Court, is affirmed. The other judges concur.[1]

LAMB *v.* PIERCE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1873.

[*Reported* 113 *Mass.* 72.]

TORT in the nature of trespass, for breaking and entering the plaintiff's close, and cutting and carrying away a quantity of wood there growing.

Trial in the Superior Court, before *Dewey*, J. The plaintiff's title was derived through a deed from Lyman Morse and others to Mary Clark, dated November 22, 1869, and duly recorded.

The defendant admitted the entry, and the cutting and carrying away of the wood, and justified as the purchaser of the wood under a conveyance to him from the same grantors and of the same date as the deed through which the plaintiff claimed.

It appeared that the wood growing upon the close described in the writ was sold at public auction in different lots by Lyman Morse and others, November 22, 1869, just prior to the conveyance of the real estate by Morse and others to Mary Clark, with license to enter upon the premises and cut and remove the wood at any time within two years from the day of sale. The defendant was one of the purchasers at the sale, and immediately thereafter received a conveyance under seal of "all the wood and timber lying, standing and being" upon the land, "with the privilege of entering said farm at any and all times prior to April 1, 1872, to take off said wood and timber."

It appeared that Mary Clark had full knowledge of the sale at the time she received her deed, and that she paid only the value of the premises, after the wood should have been cut off, and evidence was introduced tending to prove that the plaintiff knew of the sale of the

[1] And see *Brinkman* v. *Jones*, 44 Wis. 498, 517 *et seq.* (1878.)

wood at the time of the conveyance to him, and it was conceded by the plaintiff that upon the evidence the jury would be authorized to find that prior to receiving his deed he had notice of the sale of the wood, and that the purchasers had two years thereafter to cut and remove it, but he claimed that this was not sufficient; that in order to affect him with notice it was necessary that it should appear that he had knowledge or notice of the deed to the defendant, at the time of receiving his conveyance.

There was no evidence that the plaintiff, at the time of receiving his conveyance, had any knowledge or notice of the deed to the defendant.

A verdict was rendered for the defendant; and the presiding judge reported the case for the determination of this court. If, in the opinion of this court, it was necessary that the defendant, in order to justify under the sale, should prove that the plaintiff had knowledge or notice of the deed to the defendant at the time of the conveyance to himself, then the verdict was to be set aside and a new trial granted, otherwise judgment was to be entered on the verdict.

P. E. Aldrich, for the plaintiff.

G. F. Verry (*G. A. Torrey* with him), for the defendant.

MORTON, J. The deed under which the defendant justifies conveyed an interest in the land, and would be valid against a subsequent purchaser, if duly recorded, or if such purchaser when he took his deed had actual notice thereof. This is decided in the recent case of *White* v. *Foster*, 102 Mass. 375, in which the tenant claimed under a deed which is, in legal effect, like the deed in this case. As stated in that case, "growing timber constitutes a part of the realty, is parcel of the inheritance, and like any other part of the estate may be separated from the rest by express reservation or grant, so as to form itself a distinct inheritance," and "when so separated and made a distinct estate, it has the incidents of real property so long as it remains uncut, and the rules which govern the title and transfer of such property must apply." Therefore, as the conveyance, under which the defendant claims, is of a freehold estate, the provisions of Gen. Sts. *c.* 89, § 3, apply to it, and as it was not recorded, it is not valid against the plaintiff unless he had "actual notice thereof."

It appears by the report that there was evidence tending to show that the plaintiff had notice that the wood had been sold to the defendant, and that he had two years to cut and remove it, but "there was no evidence that the plaintiff, at the time of receiving his conveyance, had any knowledge or notice of the deed to the defendant."

We think this Statute requires that the plaintiff must be shown to have had actual notice that there had been a conveyance to the defendant of the estate purchased by him at the auction sale. The provision we are now considering was first enacted in the Revised Statutes, *c.* 59, § 28. Since then it has been uniformly held that no implied or constructive notice of an unrecorded deed would give it validity against a subsequent purchaser. Therefore, proof of open and notorious occu-

pation and improvement, or of other facts which would reasonably put a purchaser upon inquiry, are not sufficient, but the party who claims under an unrecorded deed must prove that the subsequent purchaser had actual knowledge or notice of such deed. *Pomroy* v. *Stevens*, 11 Met. 244; *Parker* v. *Osgood*, 3 Allen, 487; *Dooley* v. *Wolcott*, 4 Allen, 406; *Sibley* v. *Leffingwell*, 8 Allen, 584.

The case at bar falls within these decisions. The report finds that the plaintiff had no notice of the deed to the defendant. His knowledge that the defendant had bought the wood at auction, without proof that he had notice that the sale had been consummated by a conveyance to the purchaser, is not sufficient. The Statute requires proof of actual notice of the deed. It follows that, according to the terms of the report, the verdict must be set aside.

New trial ordered.

SECTION VIII.

LIS PENDENS.

NEWMAN *v.* CHAPMAN.

COURT OF APPEALS OF VIRGINIA. 1823.

[*Reported* 2 *Randolph*, 93.]

APPEAL from the Chancery Court of Fredericksburg.

George Chapman, jun., filed his bill stating that a certain John Armistead of the County of Caroline, died in 1788, leaving a large estate in lands, negroes, and other property, which he devised to his children: that, his son William Armistead received the portion allotted to him, and gave a mortgage upon his land; which mortgage was afterwards assigned to a certain Jesse Simms: that the said Simms brought a suit in the Chancery Court of Richmond, to foreclose the said mortgage, and obtained a decree, by virtue of which the land was duly sold; the said Simms became the purchaser, and the court confirmed the sale; whereby he became the lawful proprietor in fee, of the said land and appurtenances, so far as the title of the said William Armistead was concerned; and the said Simms was entitled to be put in possession of the same, subject only to the claims of such persons as should have right derived from any other person than the said William, or derived from him prior to the said mortgage or suit in chancery to foreclose, as aforesaid: that the sale and conveyance of the commissioners was made on the 13th of July, 1804, and on the 13th of August in the same year the said Jesse Simms conveyed the said tract of land with its appurtenances to the complainant, in consideration of $11,400, which the complainant had previously paid to the said Jesse Simms,

he not supposing that any dispute could be raised concerning a title, acquired and confirmed by the authority of the Court of Chancery; to which he is now obliged to apply for its further aid *to effectuate its own decree:* that a part of the said land, viz.: about 593 acres, is in possession of Thomas Newman; another part consisting of about acres is in possession of Richard Newman; and the residue is still in possession of the said William Armistead: that, Thomas and Richard Newman have no other title or claim to the said land, *except that derived from the said William Armistead, subsequent to the institution of the said suit of Jesse Simms, and while it was pending in the said Superior Court of Chancery:* that the said William Armistead has been in the receipt of the profits of the lands in his possession, by which he has principally maintained his family, and has rendered no account thereof to the complainant: that the rents and profits of the portions of land in possession of the said Thomas and Richard Newman, have been received by them, in like manner, and no account rendered to the complainant: that all these persons refuse to deliver possession to the complainant of the said lands, and also refuse to account for the profits, according to their respective receipts and enjoyments: that no writ of *habere facias possessionem* was issued from the said Superior Court, and the said Jesse Simms is dead, insolvent, and has no representative known to the complainant: that, in a case so complicated, the complainant is advised to apply to the Court of Chancery, *to carry into effect its own decree*, in such manner as shall be consistent with the just rights of all persons who do not claim title from or under the said William Armistead, since the pendency of the said suit of the said Jesse Simms, whose bill was filed on the 12th day of May, 1797; but, with regard to the said William, the complainant is advised that the said decree and proceedings of sale are final and conclusive. He therefore prays, that the said Thomas and Richard Newman, and William Armistead, may be made defendants to this bill; that the decree aforesaid may be carried into effect, in favor of the complainant, against the said William Armistead, and all persons claiming under him, since the 12th day of May, in the year 1797, &c.

Thomas Newman answered, that he had purchased of William Armistead, at different times, between the years 1793 and 1797, about 326 acres of land, out of the tract in the bill mentioned; that the deeds will fully show, at what time the purchases of the said land were made, except as to 47 acres, which were purchased in October, 1793; but, that the defendant did not get a conveyance from the said William Armistead, *until the month of July, 1797, at or about which time he purchased a further quantity of* 104 *acres*, and both purchases were included in the same deed; that the defendant *never knew anything of the existence of the suit in Chancery for the sale of the lands in the bill mentioned, until long after he had completed his purchases of the aforesaid lands of William Armistead;* nor had he ever seen anything of the mortgage in the bill mentioned; nor did he know that any

such mortgage existed, until he had completed those purchases and obtained his deeds; that the defendant also purchased of John B. Armistead, who had, before that time, purchased of William Armistead, about 513 acres of the same tract of land, on or about the month of April or May, 1800, but did not get a conveyance for the same, until the month of April, 1801; that at the sale by the commissioners, the defendant attended with his deeds, and forbade the sale, as it would be illegal, and the title was in him. He therefore charges, that the complainant, before he purchased of Simms, was fully apprised of the title of the defendant.

Richard Newman stated in his answer, that, as to the transactions between William Armistead and Abraham Morehouse, and the mortgage of land to him by the said Armistead, *he had heard nothing, until several years after he had purchased of William Armistead* 163 *acres of land, at* 40 *shillings per acre, and had the deed for the same recorded in the County Court of Prince William*, which record was made in October, 1793; and, when he did hear that such a mortgage was in existence, he also heard that *it had not been recorded in due time to give it validity against the claim of a third person.* He, therefore, hopes, that his title to the lands purchased of William Armistead, may not be affected by any decision relative to the said mortgage, &c.

The deed of mortgage from William Armistead and wife to Abraham Morehouse, was dated on the 3d day of December, in the year 1794; which mortgage was assigned by David Allison, as attorney for the said Morehouse, to the said Simms, by virtue of a power of attorney, which was attested by only *two witnesses.*

A deed from William Armistead and Nancy, his wife, and John B. Armistead to Thomas Newman, conveying 151 acres, is dated on the 11th day of September, 1797.

A deed from William Armistead to Thomas Newman, dated the 26th day of September, 1793, for 175 acres.

The bill to foreclose, brought by Jesse Simms against William Armistead, was filed on the 12th day of May, 1797.

The deed made by the commissioners for the sale of the land, under a decree of the court, to Jesse Simms, is dated on the 13th day of July, 1804.

The deed from Jesse Simms to George Chapman, the plaintiff, conveying the tract of land on which William Armistead then lived, containing 1140 acres, more or less, being the same that the said Armistead conveyed to Abraham Morehouse, by deed of mortgage, dated the 3d of December, 1794, and by the said Morehouse assigned to the said Jesse Simms.

The mortgage from Armistead to Morehouse was not recorded within the time prescribed by law.

The deed from William Armistead to Richard Newman, conveying 163 acres, is dated the 27th day of September, 1793.

William Armistead never answered the bill.

The *Chancellor* decreed, that William Armistead and Thomas Newman should severally deliver up to the plaintiff, possession of all the lands held by them, mentioned in the deed of mortgage between Armistead and Morehouse, except 175 acres described in the deed of the 26th of September, 1793, between the said Armistead and Thomas Newman; and, that one of the commissioners of the court should make up an account of the rents and profits of the lands so directed to be given up, from the 9th day of August, 1804.

Thomas Newman appealed to this court.

Stanard, for the appellant.

Wickham, for the appellee.

December 6. JUDGE GREEN delivered the following opinion: —

The object of the Statute requiring mortgages to be recorded, and declaring that, if not recorded as the Statute prescribes, they shall be void as to creditors and subsequent purchasers, was to prevent, by affording the means of ascertaining the existence of the encumbrance, the frauds which might otherwise be practised by the mortgagor and mortgagee, on creditors and subsequent purchasers, by concealing it. If a purchaser has actual notice otherwise of the existence of the mortgage, he is not only not prejudiced by the failure to record it, but is himself guilty of a fraud in attempting to avail himself of the letter of the Statute, to the prejudice of another who has a just claim against the property. The Statute, indeed, vests in the subsequent purchaser, in that case, the legal title; yet, although the legal title of the mortgagee is divested by the subsequent conveyance, his *equitable right* to subject the property to the payment of the debt, remains; not only because the mortgage is good between the parties; but, even if void as a conveyance between the parties, it would still be evidence of an agreement between them, and a court of equity will give effect to the equity of the mortgagee, by holding the subsequent purchaser to be a trustee. Upon these principles, the Court of Chancery in England has always relieved a prior purchaser, whose deed has not been registered, against a subsequent purchaser with notice.

I had at one time great doubts, whether the principle of those decisions did not apply to the case of a *lis pendens*. Lord Hardwicke, in the leading case of *Le Neve* v. *Le Neve*, 3 Atk. 646, declared, that the Statutes of Registry in England (which, as to the matter under consideration, are the same in effect as our Statute), only vested the legal title in the subsequent purchaser, and left the case "open to all equity;" and, in that case, he relieved against a subsequent purchaser, upon *constructive*, and not *actual* notice, the notice being to an agent of the purchaser. A *lis pendens* has always been spoken of in the English Court of Chancery, as a constructive notice to all the world; as all men are bound and presumed to take notice of the proceedings of a court of justice. If these propositions were universally true, it would seem to follow, that a *lite pendente* purchaser was a purchaser

with notice, and would take the property subject to the claims of the plaintiff in the suit, as the defendant held it. In all questions of fact, the existence of the matter in question may be proved by direct evidence, or by the proof of other facts, from which it may justly be inferred, that the fact in question does exist. A fact thus proved by circumstantial evidence, is taken to exist for all purposes, as if it were proved by direct evidence. I cannot, therefore, feel the force of the observation frequently thrown out in modern cases, that a notice to affect a subsequent purchaser, after an unregistered deed, must be *actual*, and such as to affect his conscience, and not *constructive*. A notice, proved by circumstances to exist, affects the conscience of the party as much as if proved by direct evidence. In all other cases, a purchaser of a legal estate, with notice of a subsisting equity, is bound by *constructive*, as well as by *actual*, notice; and *that*, because his conscience is affected, and he is guilty of a fraud. Without fraud on his part, his legal title ought to prevail. I see no reason why a difference should be made, between the case of a purchaser after an unregistered deed, and a purchaser of a legal title, subject to any other equity, as to the proof of the notice which ought to be held to bind them. This distinction between an *actual* and *constructive* notice, in the case of a purchaser after an unregistered deed, seems to have proceeded from a doubt, whether the relief given in the early cases upon that subject, had not been in opposition to the spirit and policy, as well as the letter, of the Statutes of Registry.

The rule, as to the effect of a *lis pendens*, is founded upon the necessity of such a rule, to give effect to the proceedings of courts of justice. Without it, the administration of justice might, in all cases, be frustrated by successive alienations of the property, which was the object of litigation, pending the suit, so that every judgment and decree would be rendered abortive, where the recovery of specific property was the object. This necessity is so obvious, that there was no occasion to resort to the presumption, that the purchaser really had, or by inquiry might have had, notice of the pendency of the suit, to justify the existence of the rule. In fact, it applied in cases in which there was a physical impossibility that the purchaser could know, with any possible diligence on his part, of the existence of the suit, unless all contracts were made in the office from which the writ issued, and on the last moment of the day. For, at common law, the writ was pending from the first moment of the day on which it was issued and bore *teste*; and a purchaser, on or after that day, held the property subject to the execution upon the judgment in that suit as the defendant would have held it, if no alienation had been made. The Court of Chancery adopted the rule, in analogy to the common law; but relaxed, in some degree, the severity of the common law. For, no *lis pendens* existed until the service of the *subpœna* and bill filed; but, it existed from the service of the *subpœna*, although the bill were not filed until long after; so that a purchaser, after service of the *subpœna* and before the bill

was filed, would, after the filing of the bill, be deemed to be a *lite pendente* purchaser, and as such, be bound by the proceedings in the suit, although the *subpœna* gave him no information as to the subject of the suit. A *subpœna* might be served the very day on which it was sued out, and there is an instance in the English books of a purchaser who purchased on the day that the *subpœna* was served, without actual notice, and who lost his purchase by force of this rule of law. This principle, however necessary, was harsh in its effects upon *bona fide* purchasers, and was confined in its operation to the extent of the policy on which it was founded; that is, to the giving full effect to the judgment or decree which might be rendered in the suit depending at the time of the purchase. As a proof of this, if the suit was not prosecuted with effect, as if a suit at law was discontinued, or the plaintiff suffered a nonsuit, or if a suit in chancery was dismissed for want of prosecution, or for any other cause not upon the merits, or if at law or in chancery a suit abated; although, in all these cases, the plaintiff, or his proper representative might bring a new suit for the same cause, he must make the one who purchased pending the former suit, a party; and, in this new suit, such purchaser would not be at all affected by the pendency of the former suit at the time of his purchase. In the case of an abatement, however, the original suit might be continued in Chancery, by revivor, or at law, in real actions, abated by the death of a party, by *journies accounts*, and the purchaser still be bound by the final judgment or decree. If a suit be brought against the heir, upon the obligation of his ancestor binding his heirs, and he alienates the land descended, pending the writ, upon a judgment in that suit, the lands in the hands of the purchaser would be liable to be extended, in satisfaction of the debt. But, if that suit were discontinued, abated, or the plaintiff suffered a nonsuit, in a new action for the same cause, the purchaser would not be affected by the pendency of the former suit at the time of his purchase; and, if he could be reached at law, in equity it could only be, upon proof of actual notice and fraud. If a *lis pendens* was notice *then*, as a notice at or before the purchase would, in other cases, bind the purchaser in any suit in equity, prosecuted at any time thereafter, to assert the right of which he had notice, would bind the purchaser, so ought the *lis pendens* to bind him in any subsequent suit prosecuted for the same cause; but it does not. Again; a bill of discovery, or to perpetuate the testimony of witnesses, ought, if all persons were bound to take notice of what is going on in a court of justice, to be a notice to all the world, as much as a bill for relief. But, these are decided to be no notice to any purpose; a proof that the rule, as to the effect of a *lis pendens*, is one of mere policy, confined in its operation strictly to the purposes for which it was adopted; that is, to give effect to the judgments and decrees of courts of justice, and that it is not *properly* a notice to any purpose whatsoever. The English judges and elementary writers have carelessly called it a notice, because, in one single case, that of a suit prosecuted to decree or judg-

ment, it had the same effect upon the interests of the purchaser, as a notice had, though for a different reason. But, the courts have not, in any case, given it the real force and effect of a notice.

I think that the Statute overrules this principle of law, in the case of a *lite pendente* purchaser, after an unrecorded mortgage. The decisions in the cases of notice, are according to the policy and spirit of the Statutes; since, in those cases, the purchaser has the very benefit which the law intended to provide for him, and he is chargeable with *mala fides*, in attempting to acquire that to which he knows another has a just right. He cannot complain, that the mortgagee has done him an injury by his default in failing to record his mortgage, as the law requires. But, if the purchaser were held to be affected by the pendency of a suit, if he had not actual notice, he would suffer an injury by the default of the mortgagee, unless it were held to be his duty to inquire if any suit were depending, when he had no reason to suspect that there was any defect in the title. I think, that to require him to look to any other source of information than that which the Statute has provided for him, would be contrary to the spirit and policy, and letter of the Statute.

It follows, that the decree is erroneous, as it respects the 151 acres conveyed to the appellant in September, 1797; but, as to the 513 acres, which the appellant states in his answer that he purchased in 1800, he is not protected by the Statute. He admits, that he came into the possession *pendente lite*. He does not deny notice of the mortgage, if that fact be material, upon the pleadings in this cause; and he does not show that he was a purchaser, and that a conveyance was made to him. As to this, then, the decree ought to be affirmed, unless the other objections made at the bar ought to prevail. These are, that the suit was not so instituted as to attach on Morehouse's title under the mortgage, he not being a party, and there being no evidence that his title was in the plaintiff in that suit; that a court of equity has no jurisdiction, as the plaintiff, if he has a right, has a legal remedy; that the deed under which the plaintiff claims, passed no title, as the property was then in the adverse possession of another; and, that the rents and profits should be ascertained by a jury, and not by a commissioner.

If the rule be, that a purchaser, pending the suit, is bound by the decree in the suit as the defendant is bound, then it is too late now to urge the first of these objections. It might, possibly, have been urged by Armistead, whilst the suit was depending. But, failing to do so, he was bound by the decree, whether it were right or wrong. I think, however, that the objection could not have been relied on with effect, in the original suit. The power of attorney, by authorizing the attorney to dispose of the mortgage, for and in the name of Morehouse, authorized him to convey the legal title, and that was the effect of the deed to Simms. The power of attorney being attested by only two witnesses, was not, for that cause, defective. The law does not re-

quire any particular form, as to the attestation of a power of attorney to convey land: as, between the parties, such a power may be proved by any evidence, which would be sufficient to prove any other fact in a court of justice. A court of equity always has jurisdiction to carry into effect its own decrees. In this case, a bill for that purpose was necessary; as well, because another party, not appearing as a party on the record, had become interested, as on account of the death of Simms. The decree had never been executed. If there had been no change of the interest, and Simms had lived, the decree might have been executed, and Simms let into possession by the ordinary proceedings in the court for that purpose. After the decree was so executed, if Simms, or his assignee, had been ousted or disturbed, he or his assignee would have been bound to proceed at law. The Court of Chancery was not *functus officio,* until the decree was executed by the delivery of possession.

I do not think, that Armistead could hold a possession adverse to Morehouse or his assignee, and consequently the conveyances of Morehouse and Simms passed the title they professed to pass, unless the sale to Newman varied the case; but, that sale being made pending the suit, Newman could no more hold an adversary possession, unless he had taken a conveyance without notice, than Armistead himself could. Armistead was a tenant at will, and so was Newman, standing in his place.

The account of rents and profits might as well be taken by a commissioner, as ascertained by a jury; and the former is the most usual course.[1]

Judge Coalter. I am of opinion, that the Chancellor erred in his decree, in directing the appellant to deliver possession of the tract of 151 acres, conveyed by William Armistead to him, on the 11th of September, 1797, by the deed of lease and release in the record, of that date.

The bill claims to set up a mortgage, executed by the aforesaid William Armistead, of anterior date to the above conveyance; but which was never recorded, purely on the ground, that at the time of the purchase by the appellant, there was a suit pending to foreclose the mortgage.

If the Act of Assembly in regard to mortgages not recorded, and which was in force at the time this bill was filed, is to be construed in

[1] The following were the cases referred to by Judge Green, in the course of his opinion: *Durbaine* v. *Knight*, 1 Vern. 318; *Preston* v. *Tubbin*, Ibid. 286; 15 Vin. Abr. 128, pl. 2; *Birch* v. *Wade*, Ves. & Beam. 200; *Murray* v. *Ballow*, 1 Johns. Ch. Cas.; *Lillcberry's Case*, 5 Rep. 476; Cro. James, 340; 2 Eq. Ca. Abr. 482, lb. 685; 3 Ves. 485; 1 Eq. Ca. Abr. 358; *Bennet* v. *Batchelor*, 1 Ves. jun. 64; *Habergham* v. *Vincent*, Ibid. 68; 3 Atk. 243; *Shannon* v. *Bradstreet*, 1 Sch. and Lefr. 66; *Bruce* v. *Duchess of Marlborough*, 2 P. W. 491; 2 Vent. 337; *Brotherton* v. *Hatt*, 3 Vern. 574; 2 Eq. Ca. Abr. 594; Bac. Abr. tit. Fraud, letter C; *Gooch's Case*, 5 Co. Rep. 80; 1 Fonb. Eq. 279; *Curtis* v. *Perry*, 6 Ves. 745; *Davis* v. *Earl of Strathmore*, 16 Ves. 419; *Wyatt* v. *Barwell*, 19 Ves. 439.

connection with the previous clause in relation to other conveyances, so as to transpose the words from the one to the other, in relation to notice, and thus to make the law precisely what it now is, under the Act of 1819; let us inquire how the appellee would have stood in a court of law, on a special verdict, finding simply the mortgage and subsequent conveyance, and a suit pending to foreclose the mortgage at the time of the conveyance?

The case for him would rest on an unrecorded mortgage against a subsequent conveyance, and which is expressly declared by the Act to be void as to such subsequent purchaser, *not having notice thereof.* What sort of notice? Undoubtedly, such as would affect the conscience of the purchaser; otherwise, the Act would be no safeguard to the innocent, as it was intended to be. A mere *lis pendens* is not such notice as that. This has been decided, as will be seen in a case mentioned in a note to the case of *Le Neve* v. *Le Neve;* and, also, as I am told, in a late case which I have not examined, reported in 19 Vesey. A court of law could not substitute any other kind of notice for that contemplated by the Act. But, if the party has ground for coming into equity, that court, too, I presume, must follow the law.

But if, previous to the Act of 1819, the mortgagee of an unrecorded mortgage stood, as against a subsequent purchaser, as he did in England under the Registry Acts (and I incline to think he did), then his only remedy was in equity; and there he can only prevail on the ground of fraud, or such notice as would affect the conscience of the purchaser, and which was, therefore, considered a fraud; and it has been decided as aforesaid, and, I think, correctly, that a mere *lis pendens* did not affect the conscience.

Suppose, in this case, the appellant had not denied notice, no charge of notice being in the bill, but had simply answered, that he had purchased for value, and got his deed, exhibiting it with his answer, and had demurred to the residue of the bill. Could the appellee have succeeded? I apprehend not. Or, would not such an answer have been a full response to the bill, no fraud or notice being charged, and sufficient of itself to defeat the claim of the appellee? I am much inclined to think it would; and, therefore, had the appellant exhibited a deed from William Armistead to John B. Armistead, and from the latter to him for the 513 acres mentioned in the argument, although there is no denial of notice as to it, I should, as at present advised, have thought that the appellee could not have recovered that tract, without amending his bill, and putting the fact of notice or fraud in issue; so as to give the appellant an opportunity of answering thereto. It is, however, not necessary to decide this point, because the appellant does not show himself to be a subsequent purchaser of that tract, and it is only against such that the mortgage is void.

Whether, as this is an interlocutory decree, he may hereafter be permitted to file those documents, if they exist, is not for me to know or

anticipate. On the record, now before the court, the decree must be reversed as to the 151 acres, and affirmed as to the residue.

JUDGE BROOKE concurred: and a decree was entered conformable to the foregoing principles.[1]

JACKSON d. HENDRICKS *v.* ANDREWS.

SUPREME COURT OF NEW YORK. 1831.

[*Reported* 7 *Wend.* 152.]

THIS was an action of ejectment, tried at the Cortland Circuit in June, 1829, before the *Hon. Samuel Nelson*, then one of the circuit judges.

Title was shown in the lessor of the plaintiff to the premises in question, being part of lot No. 60, Homer, under a sheriff's sale, by virtue of an execution issued on a judgment obtained by the lessor of the plaintiff against Abraham Franklin and others, docketed the 28th May, 1808. Lot No. 60, Homer, was conveyed by the sheriff of Cortland in pursuance of such sale by deed, bearing date the 15th November, 1821, to Hendricks, the lessor, and to Elisha Tibbits; and on the 5th July, 1826, Tibbits conveyed all his interest in the lot to Hendricks. The defendants being admitted to be in possession in *severalty* of *distinct parcels* of the lot at the commencement of the suit, the plaintiff rested.

The defendants, admitting Abraham Franklin to be the common source of title to both parties, produced an exemplification of the *record* of a deed, bearing date "the twenty-ninth day of March, in the year of our Lord one thousand eight hundred *and* between Abraham Franklin of, &c., of the first part, and Henry Franklin of, &c., of the second part," whereby, for the consideration of $3000, No. 60, Homer, and various other tracts of land are conveyed in fee to the grantee. This deed purported to have been acknowledged before a proper officer on the 29th March, 1808, and to have been recorded in the clerk's office of the county of Onondaga on the 21st April, 1808. Having produced this evidence, the defendants insisted that the title of Abraham Franklin having been divested in 1800, and the judgment under which the plaintiff claimed not having been docketed until 1808, the plaintiff was not entitled to recover.

To destroy the effect of this evidence, the plaintiff produced a decree

[1] "It is only by actual notice clearly proved that a registered conveyance can be postponed. Even a *lis pendens* is not deemed notice for that purpose." — *Per* SIR WILLIAM GRANT, M. R., in *Wyatt* v. *Barwell*, 19 Ves. 435, 439 (1815).

And see, *accord.*, *Douglass* v. *McCruckin*, 52 Ga. 596 (1874); *M'Cutchen* v. *Miller*, 31 Miss. 65, 85 (1856).

in chancery, made on the 20th January, 1817, whereby certain conveyances of real estate, from Abraham Franklin to Henry Franklin, made in February and March, 1808, were adjudged to have been fraudulently executed, and were declared to be null and void in law. This decree was made in a suit in chancery, in which Hendricks, the lessor of the plaintiff, was complainant, and Abraham Franklin, Henry Franklin and others were defendants. In the bill, which was filed on the 3d June, 1809, the plaintiff charged that he was a judgment creditor of Abraham Franklin to a large amount; that Abraham Franklin had fraudulently conveyed away his real estate, specifying some of the conveyances made by him, and alleging that he could not specify all; that he had issued execution on his judgment, and could not obtain satisfaction by reason of such fraudulent transfers, and praying a discovery of the conveyances made to Henry Franklin, and that the same might be avoided, &c. In the answer of Henry Franklin he admitted that Abraham Franklin, by deed, bearing date the 29th March, 1808, for the consideration of $3000, conveyed to him lot No. 60, Homer, and various other tracts, and that such deed was acknowledged on the 29th March, 1808, and recorded on the 21st April, 1808, in the clerk's office of the county of Onondaga, which conveyance he alleged was executed to him to secure him for a debt due to him, and to indemnify him for certain responsibilities assumed for Abraham Franklin. The decree avoided such conveyances as were admitted *in the pleadings* to have been executed.

The defendants now produced a deed from Henry Franklin, bearing date the 10th November, 1810, whereby, for the consideration of $1600, he conveyed lot No. 60, Homer, to J. N. Cushman, and deduced title to themselves, from Cushman to the several portions possessed by them, and as the case states, *offered to show* an adverse possession of more than twenty years before suit brought, by proving that they, more than twenty years before suit brought, were respectively in possession of the premises in question, but disclaiming to have any right or pretence of right to such possession, other than that derived through the deed from Abraham Franklin to Henry Franklin; insisting that the said deed having been recorded as a deed bearing date in 1800, and prior to the docketing of the judgment in favor of the lessor, and the defendants having purchased on the faith of that record, they were entitled to protect themselves under it as a deed of that date; which evidence thus offered to be given was objected to, and rejected. The defendants having shown that on the 5th July, 1826, and since, they were in possession of several and distinct portions of lot No. 60, *in severalty*, and this action having been brought against them *jointly*, insisted that the plaintiff was not entitled to a verdict, or if entitled, that a verdict could be rendered against one only of the defendants, and that the plaintiff was bound to make his election; and they further insisted, that being in possession, holding adversely at the date of the deed from Tibbits to the lessor, that deed was void, and conse-

quently the plaintiff, if entitled to recover, could recover but a moiety of the premises claimed. Under the direction of the judge a verdict was entered against each of the defendants for the premises in his separate possession, subject to the opinion of this court, upon the question whether the plaintiff was entitled to recover, and if so, whether he should recover the whole or only a moiety of the premises in question.

J. A. Collier, for the plaintiff.

J. A. Spencer, for the defendants.

By the Court, SUTHERLAND, J. The first inquiry in this case is as to the effect of the proceedings in chancery, instituted by the lessor of the plaintiff, upon the rights of the parties. It is not pretended that Henry Franklin had any other title to these premises than such as he acquired by the deed from Abraham Franklin; and that deed was expressly adjudged and pronounced to have been void on the ground of fraud; not incidentally and collaterally, but in a proceeding instituted in proper form and with proper parties, for the express purpose of testing its validity. Again; the conveyance from Henry Franklin to Cushman was made in November, 1810, while the suit in chancery against the grantor, calling in question his title to this identical property, was pending and in a course of active and persevering litigation. This conveyance was void on the ground of a *lis pendens*. A *lis pendens* duly prosecuted is notice to a purchaser, so as to affect and bind his interest. The conveyance is so far a nullity, that it cannot avail the party against the title established by the pending suit. This subject is very elaborately considered by Chancellor Kent, in *Murray* v. *Ballou*, 1 Johns. Ch. R. 573, and *Murray* v. *Lilburn*, 2 Id. 444, where all the cases are reviewed, and the wisdom and policy of the rule are vindicated with great learning and ability. 1 Cas. in Ch. 150; 2 Ch. Cas. 115; 1 Id. 301; Rep. Temp. Finch, 321; 1 Vernon, 286, 318, 459; 2 Id. 216; 2 P. Wms. 482; 2 Atk. 174; 3 Id. 392; Ambl. 676; 11 Ves. 194; 2 Ves. & Beames, 200; 2 Ball & Beat. 167; 2 Madd. Ch. 189, 190, 324, 325.

The purchase of land *pending* a suit concerning it, is champerty under the Statute. 1 R. L. 172. This was expressly adjudged in *Jackson* v. *Ketchum*, 8 Johns. R. 484, and in *Mowre* v. *Weaver and Postern*, Moore, 655. The conveyance in such a case is absolutely void, even where the purchase is *bona fide*, although the party will not be subjected to the penal consequences of the act. The conveyance from Abraham to Henry Franklin, and from Henry to Cushman, must therefore be considered as out of the case, so far as they are relied upon as establishing a paper title in the defendants.

The next inquiry is whether the evidence of adverse possession offered by the defendants should have been received. The case states that the defendants offered to show an adverse possession of more than 20 years, by proving that more than 20 years before the action brought, they were respectively in possession of the premises in ques-

tion; but disclaiming to have any right or pretence of right to such possession, other than that derived through the before-mentioned deed from Abraham to Henry Franklin; insisting that the said deed having been recorded as a deed bearing date in 1800, and prior to the docketing of the judgment in favor of the lessor, and the defendants having purchased on the faith of that record, they were entitled to protect themselves under it as a deed of that date. This evidence was objected to by the plaintiff's counsel, and rejected by the judge. It is difficult to understand from this statement the precise nature of the proof of adverse possession offered by the defendants. There can be very little doubt that the deed from Abraham to Henry Franklin was actually given, and was intended to have borne date in 1808. It was acknowledged on the 29th March, and recorded the 21st day of April of that year. I do not perceive how the defence of adverse possession can be affected by the circumstance (admitting such to have been the fact), that upon the record it appeared to have been given in 1800. It certainly was not recorded until April, 1808, and prior to that time the defendants could not have been misled by it; and their subsequent entry cannot be carried by relation back to the period when they supposed that deed was given, for the purpose of aiding or establishing an adverse possession. So far as I understand the nature of the evidence offered, it was properly rejected.

If the possession of the defendants was not originally adverse, then it had not become so in 1826, when Tibbits conveyed his interest in the premises to the lessor; so that the lessor is entitled to recover the whole of the premises, and not a moiety, if he can recover at all.

The case of *Jackson ex dem. Haines and Others* v. *Wood and Others*, 5 Johns. R. 278, sanctions the practice of uniting several defendants in ejectment in one suit, where the plaintiff's title in relation to all is the same, although their possessions may be several, and not joint. The jury in that case found each defendant separately guilty, as to that part of the premises in his possession, and not guilty as to the other parts possessed by the other defendants; and it was held that the plaintiff was entitled to judgment against all the defendants severally, according to the verdict. The verdict in this case is in the same form. This practice was also recognized in *Jackson* v. *Scoville*, 5 Wendell, 96.

The plaintiff must have judgment accordingly.[1]

[1] See *Edwards* v. *Banksmith*, 35 Ga. 213 (1866).

BOLLING *v.* CARTER.

SUPREME COURT OF ALABAMA. 1846.

[*Reported* 9 *Ala.* 921.]

APPEAL from a decree of the Court of Chancery for the 7th District.

Carter and Womack, on the 19th of March, 1843, exhibited their bill in chancery, in the Chancery Court of said district, against one Skanes, to obtain a decree of foreclosure on a mortgage by him of a slave. A decree was pronounced at the June Term, 1845, directing, that if a certain sum was not paid to the complainants with the costs of suit previous to a fixed day, the defendant, Skanes, should be foreclosed from all equity of redemption, and the master sell the slave, &c. The slave came to the possession of Bolling, during the pendency of the suit, by a mortgage from Skanes to him, and Bolling, under this, sold the slave, claims it as his property, and refuses to deliver it to the master, to be sold under the decree.

These facts are stated in a petition to the Chancellor, and the complainants ask that Bolling may be compelled to deliver the slave to be sold, &c.

A copy of the petition, with notice to appear, &c., was served on Bolling, who answered, insisting the mortgage under which the decree was made, although placed on record, was never acknowledged, or proven, in any manner, and that he, Bolling, had no knowledge whatsoever of its existence or execution; that on the 20th May, 1844, Skanes, for the consideration of $511, then paid him, executed to Bolling a mortgage of the same slave, conditioned to be void upon the payment of the said sum by Skanes to Bolling, on the 1st January, 1845, with power to Bolling to sell the slave at public auction, if the money should be unpaid. Under this power, Bolling exposed the slave to sale, and himself became the purchaser. The mortgage was duly acknowledged and recorded on the day of its date. Under these circumstances, Bolling insists the mortgage under which the decree was made, is absolutely null and void, and that he has the right to retain the slave, notwithstanding the decree.

The facts of the petition and answer are verified by affidavits.

The *Chancellor* considered the pendency of suit against Skanes as sufficient notice to Bolling, his mortgage having originated after the commencement of the suit, and ordered the slave to be delivered by him to the master, to be sold under the decree. Also, that Bolling should pay the costs of the petition.

Bolling appealed from this order, and here assigns it as error.

T. J. Judge, for the appellant.

No counsel appeared for the appellees.

GOLDTHWAITE, J. 1. Considering mortgages of personal property as conveyances in trust for the purpose of securing debts, they are within the terms of the Statute which declares such conveyances, unless recorded in the manner therein directed, shall be void against creditors or subsequent purchasers, *without notice*. Dig. 256, § 5. Similar protection had previously been given to *bona fide* purchasers and mortgagees, for a valuable consideration, of real estate, *not having notice*, against unregistered deeds. Dig. 154, § 18. From the similarity of terms used in these Statutes, it seems evident, the notice, to affect the subsequent purchaser, must be the same, whether the purchase is of real or personal estate. The question to be decided is, What is notice under these Statutes?

It will be remembered, the English Statutes of Registration were not common to the whole kingdom, and as we infer from the decisions, contained no exception of notice. *Le Neve* v. *Le Neve*, 1 Vesey, 64; H. & B. Notes on Coke on Litt. 290 b, § 11. It was then entirely matter of equitable construction, when the Courts of Chancery first held, it was a fraud in the holder of a registered deed, to take the estate, when he had actual notice of the conveyance of the estate, by one which was not registered. Subsequent decisions *there* have established that the notice must be such as to fix a fraud on the conscience of the subsequent purchaser, and it is in this view the courts of England held that a *lis pendens* is not sufficient, as that is only constructive notice. *Wyatt* v. *Barwell*, 19 Vesey, 435. In the American courts, the rule is believed to be universal, that constructive notice is sufficient to prevent a subsequent registered deed from taking priority of one that is unregistered. 1 Story, § 403. We cannot suppose the intention of the Legislature, in these enactments, to be to exclude the same notice which would prevail against one purchasing property which never was, but only contracted to be, conveyed.

It is perfectly clear, that a bill filed for the specific performance of a *contract*, in relation to land, will affect a purchaser from the defendant pending the suit. And can it be imagined, that one having the *actual title* by mortgage, can be in a worse condition? What distinction in principle is there to allow the rights of the complainant to be defeated by a subsequent purchase, when he has filed his bill to *foreclose a mortgage*, and to sustain these rights when the *contract is unexecuted* by a conveyance?

We apprehend no answer can be given to these questions, which will establish the right in the one instance and not in the other. On principles of public policy, it has always been considered, that a suit in equity for a specific estate, or thing, has the effect to bind all parties who became interested pending the suit. *Murray* v. *Balow*, 1 John. Ch. 566. The very condition of this case is a strong illustration that the rule should be, as we conceive it to be, universal. It would be impossible in the nature of things, after the omission to register the mortgage, to give a notice so general that all the world should know it, and

unless the suit affected the title in the possession of Skanes, it would at all times be in his power to defeat the mortgage by a sale to another. We have given more time and space to this case, because we find the Court of Appeals of Virginia, under similar circumstances, have decided, that the right of a mortgagor was defeated by a sale or mortgage, *pendente lite*. *Newman* v. *Chapman*, 2 Rand. 93. In Kentucky, however, the courts seem to hold an entire concurrence in the views expressed by us. *Thomas* v. *Southard*, 2 Dana, 475; *Doe* v. *Chaudron*, 8 Ala. Rep. 570.

In relation to the costs of the petition, the uniform practice of the court is not to reverse on such a question; it is therefore unimportant to decide whether they should, or should not have been given.

On the whole, we are entirely satisfied there is no error in the decree.

Decree affirmed.

NOTE. — See also *Grant* v. *Bennett*, 96 Ill. 513 (1880); *Smith* v. *Hodsdon*, 78 Me. 180 (1886).

SECTION IX.

PURCHASER WITHOUT NOTICE FROM PURCHASER WITH NOTICE.

VAN RENSSELAER *v.* CLARK.

SUPREME COURT OF NEW YORK. 1837.

[*Reported* 17 *Wend.* 25.]

THIS was an action of *ejectment*, tried at the Tompkins Circuit in June, 1835, before the *Hon. Robert Monell*, one of the Circuit judges.

The plaintiffs showed title in one Derick Schuyler, to lots No. 57 and 58 — Ulysses, in the military tract, containing 1,200 acres of land and a deed from Schuyler to James Van Rensselaer, the father of the plaintiffs, bearing date 25th August, 1794, conveying the two lots for the *consideration of fifty dollars;* which deed was *recorded* in the County of Cayuga, 2d January, 1804. The plaintiffs did not prove that the deed was *deposited* according to the requirement of the Act of 1794. *Previous* to the deed from Schuyler to Van Rensselaer being recorded, to wit, on the 2d July, 1799, Derick Schuyler for the consideration of $1000, conveyed the same lots to one Philip H. Schuyler, who procured his deed to be recorded on the 25th October, 1802, and on 2d April, 1805, conveyed lot No. 57 to one Samuel Clark for the consideration of $1300. Clark in 1806, conveyed to James Emott for the consideration of $2500, and Emott in 1833, conveyed to Mathias Miller for the consideration of $10,233.43. The premises in question, are

part of lot No. 57, and at the commencement of the suit, were in possession of the defendant as the tenant of Miller. It was proved that Philip H. Schuyler at the time of the conveyance to him, had *actual notice* of the deed to Van Rensselaer; this evidence was objected to but received by the judge, who charged the jury that Philip H. Schuyler was not a *bona fide* purchaser and his deed was *void*, notwithstanding it was first recorded, if at the time he took his conveyance he had knowledge or had notice of the previous deed to Van Rensselaer; and that the record of the deed to Van Rensselaer was sufficient notice to *subsequent purchasers* and rendered void the conveyances to them. The defendant excepted to the charge, and the jury found for the plaintiffs. The defendant moves for a new trial.

L. H. Palmer and *S. Stevens*, for the defendant.

J. A. Collier, for the plaintiffs.

By the Court, COWEN, J. The question of knowledge in Philip H. Schuyler was put to the jury, who found for the plaintiffs as they were directed to do by the judge, on being satisfied that he had *actual notice* of the prior deed. Their finding is fully sustained by the evidence.

The defendant moves for a new trial on the ground that James Van Rensselaer's deed, not being *deposited* as required by the Statute, was fraudulent and void as against P. H. Schuyler, though he had full notice. To this the answer is, the Act applies only to such deeds as were dated *prior* to its passage, which was on the 8th January, 1794. Van Rensselaer's deed was dated in August of that year. The Statute of 8th January, 1794, after reciting that many frauds had been committed in respect to these bounty lands, by forging and antedating conveyances of lands to different persons, and various other contrivances, so that it had become difficult to discover the legal title; for remedy whereof and in order to detect the said frauds and to prevent like frauds in future, enacted, by § 1, that all deeds, &c. theretofore made concerning such lands should, on or before the 1st of May, 1794, be deposited with the clerk of the city and county of Albany; and that those not so deposited should be adjudged fraudulent and void against the *subsequent purchaser, &c. for valuable consideration;* and that every deed, &c. *thereafter* to be made, &c. should be adjudged fraudulent and void as against any *subsequent purchaser, &c. for valuable consideration*, unless recorded by the clerk of Herkimer County, before the recording of the deed, &c. of the subsequent purchaser. Other counties were afterwards substituted as places of registry.

It is objected that Schuyler's deed was first recorded. The answer given is, he had actual notice of Van Rensselaer's deed, which was held sufficient as to him in *Jackson, ex dem. Gilbert* v. *Burgott*, 10 Johns. R. 457. The point was there very fully examined by Chief Justice Kent, who delivered the opinion of the court, and the import of the words *purchaser for a valuable consideration* was considered synonymous with *bona fide purchaser*. And it was held that *actual notice* takes away *bona fides* as effectually, under this Act, as under the

General Registry Act. The position was never doubted as to the latter, and was so expressly adjudged in *Jackson, ex dem. Merrick* v. *Post*, 15 Wendell, 588. The case of *Jackson* v. *Burgott* turned on the very points arising out of the identical Statute on which the titles of these parties depend. The court held, 1. that actual notice was equivalent to registry, and 2. that this was so as well at law as in equity. That it is so in equity is admitted by the English courts in respect to the Middlesex Registry Act, 7 Anne, *ch.* 20, § 1, which was the model of this Military Registry Act; though the King's Bench in *Doe ex dem. Robinson* v. *Allsop*, 5 Barn. & Ald. 142, refused to import the equitable doctrine into a court of law. This is but little more, probably, than a dispute about form; at any rate, it is enough for us to see that the contrary has been long settled in this court.

But it is said that Clark bought of Schuyler on the faith of finding that *his deed* was first recorded, and that he shall not be holden to look farther, and run the hazard of actual notice to Schuyler. In *Jackson ex dem. Merrick* v. *Post*, it was held that the registry of a deed is notice to every one, from the time of its being recorded, even to a purchaser standing a second or farther remove from the common source of title. The same case held that, having such notice, the purchaser takes at the peril of his immediate grantor's title being impeached by actual notice, though his deed was recorded previous to the adverse one. This, it is true, was under the General Registry Acts; but if the case of *Jackson* v. *Burgott* is to govern, the same rules apply to deeds of military bounty lands. That case holds, that actual notice is a substitute for registry. Under both Acts, to entitle the purchaser to protection he must be a *bona fide* purchaser in the strict sense of the term. He must not have notice when he buys. If the registry be notice, it takes away *bona fides*. There is nothing to distinguish the two Acts in regard to the effect of registry. By both it is declared to be notice in much the same phraseology. Under the General Registry Act it is declared that every conveyance not recorded shall be void as against *any subsequent purchaser in good faith and for a valuable consideration*, whose conveyance shall be first duly recorded. 1 R. S. 756, § 1. The Act in question, 3 R. S. 188, § 1, is, that it "shall be adjudged fraudulent and void as against *any subsequent purchaser, &c. for valuable consideration*." The condition of the subsequent purchaser, as being mediate or immediate from the common source of title, and his liability to be affected with notice, must be the same in both cases. The only question which can arise is in respect to the quality of his purchase, the first cited Statute demanding *bona fides*, the latter not doing so in terms.

New trial denied.[1]

[1] *See, accord., Mahoney* v. *Middleton*, 41 Cal. 41 (1871); *Fallass* v. *Pierce*, 30 Wis. 443 (1872).

BAYLES *v.* YOUNG.

SUPREME COURT OF ILLINOIS. 1869.

[*Reported* 51 *Ill.* 127.]

WRIT OF ERROR to the Circuit Court of Champaign County; the HON. O. L. DAVIS, Judge, presiding.

The opinion fully presents the facts in the case.

Messrs. Moore and *Caulfield*, for the plaintiff in error.

Messrs. Coler and *Smith*, for the defendant in error.

MR. JUSTICE LAWRENCE delivered the opinion of the court.

On the 10th of March, 1845, one P. S. Loughborough, residing in Kentucky, but owning a large quantity of land in Illinois, sold and conveyed the tract in dispute in this case to Young, the defendant in error. Young neglected to record his deed until December 31st, 1855. Loughborough died in 1852, having by his will left all his property to his mother, Elizabeth Loughborough, in general terms. Before he died he had sold all his Illinois lands, except a tract of two hundred and eighty acres in Vermilion County. On the 2d of June, 1855, his mother, through Joshua F. Speed, the acting executor of the will, sold and conveyed to Gamble, Crawford, Lane and Cassidy, by quitclaim deed, for the consideration of one thousand dollars, all her Illinois lands. The deed described all the lands which her son had owned, amounting to over six thousand acres. Gamble made the purchase for himself and his co-grantees. Their deed was recorded June 13th, 1855. Bayles, the appellant and complainant below, holds under them, partly by a direct and partly through an intermediate conveyance; but this is immaterial, as the deed from Loughborough to the appellee was recorded before any of the grantees of his mother had conveyed. The bill in this case was filed by Bayles, who is in possession, against Young, to have the deed from Loughborough to the latter cancelled as an unjust cloud on the title of Bayles. Young answered and also filed a cross bill, and the court decreed in his favor.

After examining the evidence in this record, we can entertain no doubt as to the correctness of this decree. The only question is, whether Gamble, who acted for himself and as agent for his co-grantees in purchasing from Elizabeth Loughborough, had actual notice that P. S. Loughborough had conveyed in his lifetime. The proof on this point is entirely conclusive. Speed, the acting executor, testifies he repeatedly told Gamble that Loughborough had sold during his life all his Illinois lands, though he might have overlooked, in the large quantity, some small tract, and offered to show him the maps of the lands and the papers in his possession left by Loughborough relating to them. These papers are made exhibits to Speed's deposition, and it appears by them, if Gamble had taken the trouble to examine them, they

would have clearly shown the tract in controversy was sold and to whom. The testimony of Ballard is equally positive. He was the law partner of Loughborough, and swears he told Gamble that Loughborough had sold all his Illinois lands, and advised him not to make the purchase. But Gamble was entirely indifferent to this information, as he had an offer for the 240 acres in Vermilion County, of the same sum he was to pay Mrs. Loughborough, and therefore incurred no risk. The information received by him from Speed and Ballard, and the still more definite information offered to him through the papers of Loughborough and declined, take from him all claim to be regarded as an innocent purchaser. The insignificance of the consideration compared with the quantity of land described in the deed, confirms the statements of these witnesses as to the character of the transaction.

Gamble must be charged with actual notice, and this disposes of the case, for before Gamble and his co-grantees conveyed, the deed from Loughborough to Young was recorded. This was notice to subsequent purchasers from Gamble. No person holds under Mrs. Loughborough who did not have either actual or constructive notice of the conveyance to Young.

Decree affirmed.[1]

MORSE *v.* CURTIS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1885.

[*Reported* 140 *Mass.* 112.]

MORTON, C. J. This is a writ of entry. Both parties derive their title from one Hall. On August 8, 1872, Hall mortgaged the land to the demandant. On September 7, 1875, Hall mortgaged the land to one Clark, who had notice of the earlier mortgage. The mortgage to Clark was recorded on January 31, 1876. The mortgage to the demandant was recorded on September 8, 1876. On October 4, 1881, Clark assigned his mortgage to the tenant, who had no actual notice of the mortgage to the demandant. The question is which of these titles has priority.

The same question was directly raised and adjudicated in the two cases of *Connecticut* v. *Bradish*, 14 Mass. 296, and *Trull* v. *Bigelow*, 16 Mass. 406. These adjudications establish a rule of property which ought not to be unsettled, except for the strongest reasons.

It is true, that, in the later case of *Flynt* v. *Arnold*, 2 Met. 619, Chief Justice Shaw expresses his individual opinion against the soundness of these decisions; but in that case the judgment of the court was distinctly put upon another ground, and his remarks can only be

[1] *See Sims* v. *Hammond*, 33 Iowa, 368 (1872).

considered in the light of *dicta*, and not as overruling the earlier adjudications.

Upon careful consideration, the reasons upon which the earlier cases were decided seem to us the more satisfactory, because they best follow the spirit of our registry laws and the practice of the profession under them. The earliest registry laws provided that no conveyance of land shall be good and effectual in law "against any other person or persons but the grantor or grantors, and their heirs only, unless the deed or deeds thereof be acknowledged and recorded in manner aforesaid." St. 1783, *c.* 37, § 4.

Under this Statute, the court, at an early period, held that the recording was designed to take the place of the notorious act of livery of seisin; and that, though by the first deed the title passed out of the grantor, as against himself, yet he could, if such deed was not recorded, convey a good title to an innocent purchaser who received and recorded his deed. But the court also held that a prior unrecorded deed would be valid against a second purchaser who took his deed with a knowledge of the prior deed, thus engrafting an exception upon the Statute. Reading of Judge Trowbridge, 3 Mass. 575. *Marshall* v. *Fisk*, 6 Mass. 24.

This exception was adopted on the ground that it was a fraud in the second grantee to take a deed, if he had knowledge of the prior deed. As Chief Justice Shaw forcibly says, in *Lawrence* v. *Stratton*, 6 Cush. 163, the rule is "put upon the ground, that a party with such notice could not take a deed without fraud, the objection was not to the nature of the conveyance, but to the honesty of the taker; and, therefore, if the estate had passed through such taker to a *bona fide* purchaser, without fraud, the conveyance was held valid."

This exception by judicial exposition was afterwards engrafted upon the Statutes, and somewhat extended, by the Legislature. Rev. Sts. *c.* 59, § 28; Gen. Sts. *c.* 89, § 3; Pub. Sts. *c.* 120, § 4. It is to be observed that, in each of these revisions, it is provided that an unrecorded prior deed is not valid against any persons except the grantor, his heirs and devisees, "and persons having actual notice" of it. The reason why the Statute requires actual notice to a second purchaser, in order to defeat his title, is apparent: its purpose is that his title shall not prevail against the prior deed, if he has been guilty of a fraud upon the first grantee; and he could not be guilty of such fraud, unless he had actual notice of the first deed.

Now, in the case before us, it is found as a fact that the tenant had no actual knowledge of the prior mortgage to the demandant at the time he took his assignment from Clark; but it is contended that he had constructive notice, because the demandant's mortgage was recorded before such assignment.

It was held in *Connecticut* v. *Bradish, ubi supra*, that such record was evidence of actual notice, but was not of itself enough to show actual notice, and to charge the assignee of the second deed with a

fraud upon the holder of the first unrecorded deed. This seems to us to accord with the spirit of our registry laws, and with the uniform understanding of and practice under them by the profession.

These laws not only provide that deeds must be recorded, but they also prescribe the method in which the records shall be kept and indexes prepared for public inspection and examination. Pub. Sts. *c.* 24, §§ 14–26. There are indexes of grantors and grantees, so that, in searching a title, the examiner is obliged to run down the list of grantors, or run backward through the list of grantees. If he can start with an owner who is known to have a good title, as, in the case at bar, he could start with Hall, he is obliged to run through the index of grantors until he finds a conveyance by the owner of the land in question. After such conveyance, the former owner becomes a stranger to the title, and the examiner must follow down the name of the new owner to see if he has conveyed the land, and so on. It would be a hardship to require an examiner to follow in the indexes of grantors the names of every person who, at any time, through perhaps a long chain of title, was the owner of the land.

We do not think this is the practical construction which lawyers and conveyancers have given to our registry laws. The inconveniences of such a construction would be much greater than would be the inconvenience of requiring a person, who has neglected to record his prior deed for a time, to record it, and to bring a bill in equity to set aside the subsequent deed, if it was taken in fraud of his rights.

The better rule, and the one the least likely to create confusion of titles, seems to us to be, that, if a purchaser, upon examining the registry, find a conveyance from the owner of the land to his grantor, which gives him a perfect record title completed by what the law, at the time it is recorded, regards as equivalent to a livery of seisin, he is entitled to rely upon such record title, and is not obliged to search the records afterwards, in order to see if there has been any prior unrecorded deed of the original owner.

This rule of property, established by the early case of *Connecticut* v. *Bradish*, ought not to be departed from, unless conclusive reasons therefor can be shown.

We are therefore of opinion, that, in the case at bar, the tenant has the better title; and, according to the terms of the report, the verdict ordered for the demandant must be set aside, and a

New trial granted.[1]

P. H. Cooney, for the demandant.
E. S. Mansfield, for the tenant.

[1] See *Day* v. *Clark*, 25 Vt. 397 (1853).

SECTION X.

ESTOPPEL.

WHITE *v.* PATTEN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1837.

[*Reported* 24 *Pick.* 324.]

WRIT of entry to recover a messuage in Brookline.

On a case stated, it appears, that both parties claim under Isaac Thayer.

The demandant derives his title from a mortgage made to him by Thayer, dated the 30th of December, 1833, and recorded on the 19th of February, 1834, containing the usual covenants of seisin, warranty, &c.

At the time of the execution of the mortgage to the demandant, the legal title was in John Perry, the father-in-law of Thayer. Perry conveyed to Thayer in fee simple, by deed dated the 20th of July, 1834, and delivered on the 2d of August, in the forenoon.

The tenant derives his title from a mortgage made to him by Thayer, dated the 21st of July, 1834, and delivered on the 2d of August, 1834, in the afternoon, containing the usual covenants of seisin, warranty, &c. This mortgage, and the deed from Perry to Thayer, were left for registry at the same time, in the afternoon of the 2d of August.

Thayer was in possession at the time of making the mortgage to the demandant, and continued in possession until the 13th of February, 1835, when the demandant entered under his mortgage; and the demandant remained in possession, by Thayer, who became his tenant, until Thayer was dispossessed by Patten, by a writ of *habere facias* on a judgment against Thayer. The demandant had no actual notice of Thayer's want of title, at the time when Thayer conveyed to him, and Patten had no actual notice of that conveyance at the time when Thayer conveyed to Patten.

Judgment was to be entered for the demandant or the tenant, according to the opinion of the court on the foregoing facts.

C. P. Curtis and *B. R. Curtis*, for the demandant. Thayer being in possession and claiming to own the fee, his deed to the demandant gave a title valid against all persons except the true owner. *Bearce* v. *Jackson*, 4 Mass. R. 408. Thayer is estopped to say, he was not seised at the time when he delivered that deed; *Comstock* v. *Smith*, 13 Pick. 119; and Patten, who claims under him, being privy in estate, is likewise estopped. *Rawlyn's Case*, 4 Coke, 52; *Trevivan* v. *Lawrence*, 1 Salk. 276; *Right* v. *Bucknell*, 2 Barn. & Adolph. 278; *Coe* v.

Talcot, 5 Day, 88; *Penrose* v. *Griffith*, 4 Binney, 231; *Carver* v. *Astor*, 4 Peters, 83; *Fairbanks* v. *Williamson*, 7 Greenleaf, 97. The moment Thayer obtained a title from Perry, the legal owner, it enured to the use of the demandant. *Somes* v. *Skinner*, 3 Pick. 52, (2d ed. and notes;) *Doe* v. *Oliver*, 10 Barn. & Cressw. 186.

Clarke, for the tenant. Under our Statutes, the conveyance by Thayer to Patten, after Thayer had acquired the legal title, was effectual against all persons. His previous conveyance was good, "against the grantor and his heirs only." St. 1783, *c.* 37, § 4; Revised Stat. *c.* 59, § 1, 28; 3 Mass. R. 574, 575, 581, 582; *Bates* v. *Norcross*, 14 Pick. 230; *Ward* v. *Fuller*, 15 Pick. 189; 2 Bl. Comm. 290; *Davis* v. *Hayden*, 9 Mass. R. 519. A purchaser does enough, so far as regards the acts of his grantor, if he searches the records back to the time when the grantor acquired his title; if he must go farther back, for the purpose of ascertaining whether the grantor did not convey before he had a title, he must make the like investigation in regard to all those through whose hands the estate had previously passed for a series of years, and titles will possess no certainty. The recording of the deed to the demandant, therefore, was not constructive notice to Patten. If the demandant, in the exercise of ordinary diligence, had examined the records before he took his deed, he would have perceived that Thayer had no title. The principle of estoppel applies, in the case of a covenant of warranty, to prevent circuity of action. Thayer is estopped to deny the demandant's title, because the demandant might sue him on his covenant; but Patten is a stranger and not liable to be sued on any covenant, and so there is no circuity of action. *Blight's Lessee* v. *Rochester*, 7 Wheaton, 547; *M'Crackin* v. *Wright*, 14 Johns. R. 194; *Somes* v. *Skinner*, 3 Pick. 61; *Comstock* v. *Smith*, 13 Pick. 119.

PUTNAM, J., afterward drew up the opinion of the court. If the controversy were between Thayer and White, it would be perfectly clear that Thayer could not prevail, notwithstanding the legal title were in Perry, at the time when Thayer conveyed to White. Thayer, having subsequently acquired the legal title, would be estopped to say that he was not seised in fee of the estate which he had conveyed with warranty to White. *Somes* v. *Skinner*, 3 Pick. 60.

It is then to be considered, whether the tenant, who claims the same estate as the grantee of Thayer, by a subsequent conveyance of the same, is estopped to say that Thayer was not seised, inasmuch as Thayer himself would be clearly so estopped, if he were a party.

In 1 Salk. 276, *Treviran* v. *Lawrence et al.*, it was held, that parties and all claiming under them were bound by estoppels; "as if a man makes a lease by indenture of D., in which he hath nothing, and afterwards purchases D. in fee, and afterwards bargains and sells it to A. and his heirs, A. shall be bound by the estoppel; and that where the estoppel works on the interest in the land, it runs with the land into whose hands soever the land comes."

So in 6 Mod. 258, s. c., Lord Chief Justice Holt states the case

thus: "If a man by deed indented make a lease of Dale, reserving rent, in which at that time he has nothing, and afterwards he purchases Dale, and bargains and sells it to a stranger, the bargainee shall hold it liable to the first lease, and coming under him who made the lease shall be estopped to say that the bargainor had nothing to let in the premises at the time of the lease made; for this estoppel runs upon the land and alters the interest of it."

The case of *Fairbanks et al.* v. *Williamson*, 7 Greenleaf, 96, is in point. On the 15th of December, 1818, Weston made a deed to Webster. The demandants levied an execution upon the demanded premises as belonging to Webster, in July, 1827, and Webster released to the demandants on the 27th of August following. When Weston made his deed to Webster, he (Weston) had no title, but it was in the Commonwealth. But in June, 1820, the committee for the sale of eastern lands conveyed the title of the Commonwealth to Weston. Weston, on the 10th of May, 1821, conveyed the demanded premises to the tenant in fee. And it was held that Weston, by his deed and covenant (although it was not of general warranty, as is the case at bar) was estopped to make any claim or title to the land, and that the tenant, claiming subsequently under Weston, was privy in estate and bound by the estoppel.

The case of *Weale* v. *Lower*, Pollexfen, 60, is to the same point. Where one conveyed by a fine an estate which at the time was contingent, yet the party conveying was bound by estoppel, and when the contingency happened, that "which at the beginning was only good against him by estoppel would then have been turned into a good estate and term in interest." And p. 66, *per* Lord Chief Justice Hale: "The estate which cometh to the heir upon the happening of the contingency, feeds his estoppel, and the estate by estoppel becometh an estate in interest, and shall be of the same effect as if the contingency had happened before the fine levied."

So in the case at bar, Thayer and his heirs and assigns are bound by his deed with warranty to White. The tenant claims the same estate as the assignee or grantee of Thayer by a subsequent conveyance, and the tenant is concluded, as his grantor was concluded, to aver that Thayer had no title when he conveyed to White. The tenant is privy in estate.

Co. Lit. 352 a. Privies in blood, as the heir, privies in estate, as the feoffee, lessee, &c., privies in law, comprehending those who come in by act in law or in the *post*, shall be bound and take advantage of estoppels.

Termes de la Ley, *Privy*. "The lessees or feoffees are called privies in estate, and so are their heirs."

The conveyance of the title by the deed of Perry to Thayer, after his deed to White, turned the estoppel which bound Thayer and his heirs and assigns, into a good estate in interest. So that by the operation of law the interest should be considered as vested in him in the same

manner as if it had been conveyed to Thayer before he conveyed to White. And if that had been the case there could be no question between these parties now before the court. For White procured his deed from Thayer to be recorded before the tenant obtained his deed from Thayer.

It would be very easy to multiply authorities in support of the principle upon which this case is decided, but it is not necessary. The court are of opinion, for the reasons and upon the authorities before referred to, and cited by the counsel for the demandant, that he is entitled to recover.[1]

CALDER *v.* CHAPMAN.

SUPREME COURT OF PENNSYLVANIA. 1866.

[*Reported* 52 *Pa.* 359.]

ERROR to the Court of Common Pleas of Wayne County.

This was an action of ejectment by Abner Chapman against Alexander Calder, William C. Marshall and Walker Marshall, for a tract of about 30 acres of land. Israel Chapman and Alexander Calder, being the joint owners of a large tract of land, made partition, and Chapman conveyed to Calder the one-half, "excepting from and out of the above described premises the undivided two-thirds part of the 'Factory Lot.'" Subsequently, under proceedings in partition, Chapman acquired title to the whole "Factory Lot." Afterwards, November 1st, 1853, Calder mortgaged to the Marshalls, defendants, the whole tract, describing it by metes and bounds, which included the "Factory Lot." The lot was not excepted from the mortgage. Chapman having died, his executors conveyed the "Factory Lot" to Calder, September 21st, 1854. On the 5th of August, 1858, a judgment was recovered against Calder, under which the "Factory Lot" was sold to Abner Chapman, plaintiff, and conveyed to him by the sheriff, September 4th, 1862. The whole tract was, on the 2d of September, 1862, sold by the sheriff to the Marshalls under their mortgage. Chapman then brought this action of ejectment.

On the trial, *Barrett*, P. J., charged, amongst other things: —

"The question raised is, Whether the 'Factory Lot' was bound by the mortgage. As between the parties it clearly would have been. The mortgagor might have perfected his title to the land for the benefit of the mortgagee. But we have to deal with subsequent lien-creditors. The judgment was entered against property acquired subsequent to the mortgage. It became at once a lien. A judicial sale conveyed it clear of any lien under the mortgage.

[1] Followed, *Knight* v. *Thayer*, 125 Mass. 25 (1878); *McCusker* v. *McEvoy*, 9 R. I. 528 (1870).

"As between the lien-creditors the judgment had preference. But however that may have been, it was a judicial sale, and the title to the 'Factory Lot' passed to the plaintiff. If Chapman was an innocent purchaser, then he took it discharged from the lien of the mortgage. If he was not, did the record furnish him notice of any lien? It must have shown that the title to the lot was acquired subsequently to the making and recording of the mortgage. This being the fact, the verdict of the jury must be for the plaintiff."

The jury having found for the plaintiff, this instruction was assigned for error.

F. M. Crane, for plaintiffs in error.

S. E. Dimmick, for defendant in error.

The opinion of the court was delivered, October 17th, 1866, by

Read, J. At the time Alexander Calder executed the mortgage to William C. Marshall and Walker Marshall of the 30 acres called the "Factory Lot," included in the boundaries of a larger piece of land embraced in the mortgage, the mortgagor had no title or estate of any kind in the said "Factory Lot." The mortgage was dated November 1st, 1853, and recorded on the 3d.

At the time of the execution, Israel Chapman was the undisputed owner of the 30 acres, and he died in July, 1854; and Abner Chapman, who was one of the sons of Israel, with the executors and other heirs of the said decedent, by deed dated September 21st, 1854, conveyed the "Factory Lot" to Alexander Calder.

The judgment of Van Dusen & Jagger against Alexander Calder was entered August 5th, 1858; and, on the 23d of August, 1862, the "Factory Lot" was sold thereon, by the sheriff, to Abner Chapman, and deed executed to him and acknowledged by the sheriff, September 4th, 1862; the moneys arising from the said sale being applied to an earlier judgment of *Hornbeck* v. *Calder*.

The Marshalls proceeded on the mortgage, and on the 2d September, 1862, the sheriff, under *levari facias*, sold the larger tract, including the thirty-acre "Factory Lot," to the plaintiffs, the Marshalls; the deed to them was executed and acknowledged September 4th, 1862.

The question is, By these sales who became the owner of the "Factory Lot"? Was it Chapman, or the Marshalls?

It is said, "that if a man sells and conveys land to which he has no right or title, and afterwards buys or acquires the title to the same land, he cannot claim it as against his grantee;" and, whether this rule is based on estoppel or rebutter, or upon the equity as practised in Pennsylvania by which that which ought to be done is considered as done, is perhaps immaterial, as the effects of our Recording Acts must be the same in either case.

This whole subject has been fully ventilated by Judge Hare in his very able note to the *Duchess of Kingston's Case*, in 2 Smith's Lead. Cas. pp. 705, 723–4 (ed. 1866), and in Mr. Rawle's excellent work on Covenants for Title (3d ed.), ch. 9; and perhaps the most succinct

statement of the doctrine is to be found in the very clear and lucid opinion of Mr. Justice Nelson, in *Van Rensselaer* v. *Kearney*, 11 How. 297. "It is a doctrine, therefore," said he, "when properly understood and applied, that concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only where, in conscience and honesty, he should not be allowed to speak."

Now, in the present case, in searching for encumbrances or conveyances, the search against Calder would begin with his title from Chapman, and the search beyond would be against Chapman and those through whom he claimed; and a search against Calder during the same period would be considered an utter absurdity. If the mortgage and the conveyance were ten years apart, the case would only be more glaring than the one presented to us.

In *Uhler* v. *Hutchinson*, 11 Harris, 110, it was held that the holder of an unrecorded mortgage, or of a mortgage illegally recorded, by giving notice of its existence, at a sheriff's sale upon a judgment, cannot bind the estate mortgaged in the hands of a purchaser at such sale, where the judgment-creditor had no notice of the mortgage when his judgment was entered. In this case the mortgage had a defective acknowledgment. So, where the mortgage is made by an absolute conveyance with a deed of defeasance, and the defeasance is unrecorded, it is decided that it will be considered as an unrecorded mortgage; and where the absolute deed and the defeasance were recorded in the same volume, on the same day, and, though it did not expressly so appear, most probably in *juxtaposition*, C. J. Gibson said, "The principle applicable to them is the same: a creditor in search of a clew to the title would necessarily stop at a conveyance absolute on the face of it, and referring to nothing beyond it, he would have no reason to suspect that further search would lead to a defeasance, of which, not lying in the channel of the title, he would not, *though actually recorded*, be bound to take notice." "If the record of the encumbrance lay not in the creditor's way, he was not bound to notice it." *McLanahan* v. *Reside*, 9 Watts, 510, 511. And, in *Luch's Appeal*, 8 Wright, 519, it was held that mortgages must be recorded in mortgage-books, and are not properly recorded in any other species of books, where they cannot be found by means of the mortgage index. In that case the mortgage was recorded in the Book of Miscellanies in Northampton County, and it was held to be an unrecorded mortgage.

These decisions rule this case, and there is no hardship on the mortgagees; for an examination of the title when they took the mortgage must have shown them Calder had no title to the "Factory Lot;" an innocent creditor should not suffer for their gross negligence.

Judgment affirmed.

SECTION XI.

RECORD NO NOTICE TO PRIOR PURCHASERS.

GEORGE *v.* WOOD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1864.

[*Reported* 9 *Allen*, 80.]

BILL in equity to redeem land from a mortgage. After the former decision in this case, reported in 7 Allen, 14, the parties agreed upon the following facts: —

On the 8th of August, 1853, Nathaniel Chessman, being seised of a tract of land in Milford, mortgaged it to Asa Wood, the defendant's intestate, to secure the sum of $1000, which has never been paid, unless the release hereinafter mentioned from the defendant to Chessman operated as a payment of the same. Asa Wood afterwards died, and the defendant was appointed administratrix of his estate about the 1st of January, 1856. On the 12th of May, 1855, Chessman mortgaged a part of the land, described as bounded on land of Daniel Finley, with full covenants of warranty, to the plaintiff, to secure the sum of $1500, which remains wholly unpaid. This mortgage was duly recorded in May, 1855. On the 4th of August, 1856, Chessman conveyed another portion of the land to Crawford Pierce, by deed of warranty, duly recorded on the 20th of November, 1856. On the 26th of February, 1857, Chessman conveyed another portion of the land to Daniel Finley, by deed of quitclaim, duly recorded on the 25th of March, 1857. On the 26th of February, 1857, the defendant released and discharged the lot conveyed to Pierce, describing it as running "to the southerly corner of land of Daniel Finley," from the operation of the mortgage to Asa Wood, by her deed of quitclaim to Chessman, recorded on the 16th of March, 1857.

In 1855 Chessman sold to Finley the lot described in the deed to the latter, of February 26th, 1857; and Finley claimed to have had a warranty deed thereof, which was lost.

There was no evidence that the defendant, at the time of executing her release to Chessman, had any actual knowledge of the conveyance to the plaintiff, or of that to Finley.

The case was reserved by *Chapman*, J., for the determination of the whole court.

P. C. Bacon, (*P. E. Aldrich* with him,) for the plaintiff.

T. G. Kent, for the defendant.

HOAR, J. It must be considered as settled that when the owner of an equity of redemption conveys by deed of warranty a part of the

mortgaged premises, neither he, nor his heirs, nor subsequent grantees with notice of the remaining part of the mortgaged premises, are entitled in equity to contribution from the first grantee, toward payment of the mortgage debt. *Chase* v. *Woodbury*, 6 Cush. 143. *Bradley* v. *George*, 2 Allen, 392. *George* v. *Kent*, 7 Allen, 16. *Kilborn* v. *Robbins*, 8 Allen, 466. The land remaining in the mortgagor is first chargeable; and the equity of his vendee will be enforced against any subsequent purchaser from him with notice. *Allen* v. *Clark*, 17 Pick. 47.

The weight of authority seems to be that this equity of a purchaser from the mortgagor is one which the mortgagee must regard, if he has actual or constructive notice of it. *Parkman* v. *Welch*, 19 Pick. 231. *Brown* v. *Simons*, 44 N. H. 475. 1 Washburn on Real Prop. 572, and cases cited. 4 Kent Com. (8th ed.) 189, *n.* If the mortgagee, therefore, releases a part of the mortgaged estate to a purchaser, he must abate a proportionate part of the mortgage debt, if it be necessary to protect a prior purchaser, of whose title he had notice when he made the release. The equities between successive purchasers from the mortgagor will be in the order in which they take their conveyances, if the subsequent purchasers have notice of those which precede. *Guion* v. *Knapp*, 6 Paige, 35. *Clowes* v. *Dickenson*, 5 Johns. Ch. 235; s. c. 9 Cow. 403.

These principles must govern the rights of the parties to this suit; and the first question is, whether the defendant, when she executed the release of the lot purchased by Pierce, had notice of the prior conveyance to the plaintiff. His conveyance was on record, which he contends was constructive notice. The release was to the original mortgagor, and there is no proof of any other notice than the record of the plaintiff's deed. It has been held in New York that the recording of a second mortgage is not constructive notice to the mortgagee under a first recorded mortgage. *Wheelwright* v. *Depeyster*, 4 Edw. Ch. 232. *Talmadge* v. *Wilgers*, Ib. 239, *n.* *Cheesebrough* v. *Millard*, 1 Johns. Ch. 409. *Stuyvesant* v. *Hone*, 1 Sandf. 419. The same doctrine has prevailed in Pennsylvania. *Taylor* v. *Maris*, 5 Rawle, 51. And it was adopted by Mr. Justice McLean, of the Supreme Court of the United States. 3 McLean, 603.

The question is not free from difficulty, but we are not aware of any adjudged case to the contrary; nor indeed of any case in which the record of a deed has been held to be constructive notice to any persons other than subsequent purchasers, or those claiming title under the same grantor. 2 White & Tudor's Lead. Cas. in Eq. (Amer. ed.) 193. In *Parkman* v. *Welch*, *ubi supra*, it is to be observed that no question seems to have been suggested in the argument or decision as to the necessity of any notice to the mortgagee; and no allusion is made in the opinion to the effect of any prior equity resulting to the prior purchaser from the mortgagor. The case apparently rests upon the idea that all parts of the mortgaged premises were equally liable to contrib-

ute in proportion to their value, in the hands of separate purchasers, without regard to priority; and that the release of one parcel by the mortgagee would be a discharge *pro tanto* of the mortgage. In these respects it is not easy to see how the case can be reconciled with *Allen* v. *Clark;* and it is certainly inconsistent with the recent decisions of this court to which reference has been made. But these points, although necessarily involved in the decision, were not brought to the attention of the court; and the case of *Allen* v. *Clark* was decided before the justice who gave the opinion in *Parkman* v. *Welch* came upon the bench, and had not then been reported.

In *Brown* v. *Worcester Bank*, 8 Met. 47, the right of a prior purchaser of a part of an equity of redemption to exemption from contribution to purchasers of the residue was not noticed by Mr. Justice Wilde, who gave the opinion in *Allen* v. *Clark*, although it apparently existed. But it is now firmly established as a rule in equity in this Commonwealth.

When, however, the purchaser seeks to enforce his equity against the mortgagee, it is reasonable to require strict proof of notice. He takes his title with full knowledge that it is subject to the mortgage; and if he does not perfect it by a release, he ought not to subject the mortgagee to the constant necessity of investigating transactions between the mortgagor and third persons subsequent to the mortgage, in order to protect him; when by giving notice he can so easily protect himself. The establishing of such mere collateral equities, which do not affect the legal title, cannot be considered as within the purposes intended to be accomplished by the Statutes for registration of deeds.

The only remaining point which has been argued relates to the priority of equities between the plaintiff and Finley. The plaintiff contends that Finley's title preceded the grant to Pierce; and that the release to Pierce being made with notice of Finley's title, as shown from the recital in the release that the land bounded on a corner of Finley's land, discharged Finley from the obligation to pay the proportion of the mortgage which should have been borne by the Pierce lot; and that as Finley's title was subsequent to the plaintiff, the plaintiff is deprived of any right of subrogation against him. But the facts do not find when Finley's title was acquired, or his purchase-money paid. The only deed to Finley, which it is agreed ever existed, was subsequent to both the plaintiff's and Pierce's. If the recital in the release is proof of an earlier title, the similar recital in the plaintiff's deed would prove in like manner that Finley had a priority over the plaintiff. But we think a conclusive answer is, that this question of contribution cannot be settled without making Finley a party to the suit, which the plaintiff has not done. *Avery* v. *Petten*, 7 Johns. Ch. 211.

SECTION XII.

MARSHALLING.

DAY *v.* MUNSON.

SUPREME COURT OF OHIO. 1863.

[*Reported* 14 *Ohio St.* 488.]

RESERVED in the District Court of Cuyahoga County.

This action was instituted by the plaintiffs, to enforce the liens which they claim were secured to them by two mortgages upon certain chattel property, executed by the defendants, Munson & Spear, to secure certain indebtedness to them.

The Cleveland Paper Mill Company, as the assignee of T. L. Wilcox, to whom a mortgage was executed upon the same property substantially, and Younglove & Hoyt, who likewise received from said Munson & Spear a mortgage on the same property, were, among others, made parties.

The dates, times of filing and refiling, and the amounts due on each of these mortgages, on the —— day of September, 1861, as found by the District Court, are as follows: —

1. First mortgage to the plaintiffs, dated December 12, 1857, filed February 16, 1858; re-filed March 22, 1859; amount $995.

2. Second mortgage to the plaintiffs, dated July 3, 1858, filed July 6, 1858; refiled July 7, 1859; amount $467.56.

3. Mortgage to Wilcox, dated July 6, 1858, filed July 6, 1858; re-filed July 1, 1859; amount $54.17.

4. Mortgage to Younglove & Hoyt, dated October 28, 1858, filed October 28, 1858; refiled October 14, 1859; amount $949.75.

The pleadings and the findings of the District Court, show that the Wilcox mortgage had originally been given, with full knowledge, on the part of Wilcox, of plaintiffs' mortgages, to secure the payment of $1000, due from Munson & Spear; that on the 30th December, 1858, Wilcox assigned said mortgage to defendant Warren to secure the amount then due Warren from Wilcox (which the court found, as above, to amount to $54.17, on the —— day of September, 1861), also, to secure any future advances which Warren might make for Wilcox, or liabilities which he might incur for him. That, on the first of January, 1859, Wilcox became the purchaser of the property from Munson, subject to the above mortgages, and agreeing to pay them off, except the one to himself. That, about September, 1859, Warren made advances for Wilcox, or became liable for him to the amount, with interest to said —— day of September, 1861, of $408.44. That the

remainder of the Wilcox mortgage was, subsequent to the commencement of this suit, assigned by Warren, at the request of Wilcox, to the Lake Erie Paper Mill Company, who are now the owners of any benefit that may be derived therefrom.

The amount which may ultimately be realized from the mortgaged property, is yet uncertain; but there is reason to apprehend that the proceeds of its sale will be insufficient to discharge the amount due to the plaintiffs on their two mortgages, the amount found due to Warren, as the assignee of the Wilcox mortgage, and the amount due Younglove & Hoyt under their mortgage. And with a view to the adjustment and determination of the respective priorities of these mortgagees, the questions of law arising upon the facts found by the District Court, and shown by the pleadings, have been reserved for the decision of this court.

Hitchcock, *Mason*, and *Estep*, for plaintiffs.

Backus and *Noble*, for Younglove & Hoyt.

SCOTT, J. The first question arising in this case is, whether by force of the Statute, the plaintiffs' mortgages, upon the failure to refile them within one year from the time of the first filing, became void as against Younglove & Hoyt, whose mortgage was executed and filed within the year, and who received the same without actual notice of plaintiffs' mortgages.

The fourth section of the Act requiring mortgages or bills of sale of personal property to be deposited with township clerks, provides that, "Every mortgage so filed, shall be void, as against the creditors of the person making the same, or against *subsequent* purchasers or *mortgagees* in good faith, *after* the expiration of one year *from the filing thereof*, unless, within thirty days next preceding the expiration of the said term of one year, a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property at the time last aforesaid, claimed by virtue of such mortgage, shall be again filed in the office," &c. S. & C. St. 476.

The first section of the same Act provides that mortgages of goods and chattels, not accompanied by delivery, and followed by actual and continued change of possession, shall be void as against creditors, and subsequent purchasers, and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be forthwith deposited, &c.

The question in this case turns upon the proper construction and meaning of the expression "subsequent purchasers and mortgagees in good faith," as used in these sections.

It is well settled, in New York, under a Statute substantially similar, and from which our own has been mainly copied, that to constitute "good faith" on the part of the subsequent mortgagee, there must be the absence of actual notice of the existence of the prior mortgage. And so it was held by this court, in *Paine et al.* v. *Mason et al.*, 7 Ohio St. Rep. 198. In that case, it was also held, that constructive notice alone, of the prior mortgage, would not constitute *mala fides* on

the part of the subsequent mortgagee; and that as against him, the priority of the first mortgage could not be retained, without refiling pursuant to Statute.

That decision, unless overruled, must be fatal to the claim of the plaintiffs in this case. We are accordingly asked to reconsider the question thus decided, on the ground that the court, in that case, assumed, without full consideration, that the term "subsequent" in each of these sections had relation to the same thing; that is, to the time of the execution of the mortgage declared to be void; whereas the policy of the Statute requires the term "subsequent," in the fourth section of the Act, to be construed as relating to the expiration of the year within which the refiling is required. And in support of this view, we are referred to the case of *Meach* v. *Patchen*, 4 Kernan, 71, in which it was so held by the Court of Appeals of New York (Mitchell, J., dissenting). The decision of the majority of the court, in that case, is supported by reasoning, which is, certainly, not without force. But it is a construction given to the Statute *after* its adoption in this State, and in opposition to the opinion expressed by Justice Cowen, in *Gregory* v. *Thomas*, 20 Wend. 19, *prior* to the enactment of the Statute in this State. This latter opinion, it is true, was of an *obiter* character, but I am not aware of any New York decision to the contrary, prior to the enactment of our own Statute. Subsequent decisions, which could not have been before the mind of the Legislature, can throw no light on its intentions. Besides, the phraseology of the fourth section of the Statute of this State differs somewhat from that of the corresponding section in the New York Act, and is such that the term "subsequent," in the fourth section, cannot well be regarded as referring to any later point of time than the original filing of the mortgage. The language is, "Every *mortgage* so *filed* shall be void, as against the creditors of the person *making* the same, or against *subsequent* purchasers or *mortgagees* in good faith," &c. Subsequent to what? The phraseology would import, subsequent to the *making*, or to the *filing* of the mortgage, which are the only acts previously spoken of. As the term refers clearly to the making of the mortgage in the first section, it should not, without strong reason, be differently construed in the fourth. And we think it by no means clear, that the policy of the Act designed to place a mere creditor on a better footing than a *bona fide* mortgagee, in respect to the laches of a prior mortgagee.

Where a subsequent mortgage is taken in good faith, and without actual notice of a prior one, no satisfactory reason is perceived, why the rights of its owner should depend on the fact of its date being one day before, or one day after, the laches of the first mortgagee. In either case, the Statute may reasonably have intended, that such laches should inure to the benefit of the specific lienholder, as well as to that of the mere creditor.

Besides, no disapprobation of the construction given to the Statute,

in the case of *Paine* v. *Mason*, has been indicated by any subsequent legislation; and when to this acquiescence we add the further consideration, that a decision which has become known, and been acted on as an established rule of property, should not be lightly overruled, and the law be thereby rendered uncertain, we are satisfied that the former decision of this question should stand as the law of this State, until changed by legislative authority.

The case, then, stands thus: The plaintiffs' mortgages, not having been refiled, pursuant to Statute, are void as to Younglove & Hoyt, the third mortgagees; but the plaintiffs retain their priority of lien over Warren, who holds under Wilcox, the second mortgagee, and whose mortgage was taken with actual notice of the plaintiffs' prior mortgages. Warren's lien under the Wilcox mortgage has priority over that of the third mortgagees, and is not to be affected by the *laches* of the plaintiffs. The plaintiffs' mortgages are, then, not to affect the rights of the third mortgagees; nor is the *laches* of the plaintiffs to affect the rights of the second mortgagee; and whatever rights these conditions leave to the plaintiffs they still retain. The result will be, if the fund is insufficient for the discharge of all mortgages, that the third mortgagees, Younglove & Hoyt, are entitled to so much of the fund as would be applicable on their mortgage, after satisfying Warren's prior lien. Warren is entitled to so much of the fund as would be applicable to the satisfaction of his claim, leaving the third mortgage out of the question, and preserving the plaintiffs' priority of lien. And the plaintiffs are entitled to the residue.

The case will, therefore, be remanded to the District Court, for decree and distribution pursuant to the foregoing opinion of this court, and for such further decree as may become necessary.

Brinkerhoff, C. J., and Wilder and White, JJ., concurred.

Ranney, J., having been of counsel, did not sit in this case.

SAYRE *v.* HEWES.

Court of Chancery and Court of Errors and Appeals of New Jersey.[1] 1880, 1881.

[*Reported* 32 *N. J. Eq.* 652; 33 *N. J. Eq.* 552.]

On final hearing on bill, answer and proofs.

Mr. Joseph Coult, for complainant.

Mr. James W. Field, for defendant Francis M. Hoag.

The Vice-Chancellor. [Van Fleet.] This is a strife for position. The facts material to the controversy are as follows: On the 3d of December, 1877, Mrs. Margaret V. Hewes executed a chattel

[1] In the latter court *sub nom. Hoag* v. *Sayre*.

mortgage on certain chattels, then being in a building in the city of Newark, to Francis M. Hoag, and the mortgage was, on the same day, filed in the office of the register of the county of Essex; a second mortgage on the same chattels was executed by Mrs. Hewes to Frederick Fisher, February 14th, 1878, which was filed March 2d, 1878, in the office of the register of Hudson County; a third mortgage was executed by Mrs. Hewes to the complainant (Edward Sayre), on the same chattels, February 25th, 1878, which was also filed in the office of the register of Hudson County on the day of its date; on the 27th of February, 1878, the complainant recovered a judgment against Mrs. Hewes, by confession, in the Essex County Circuit Court, and another judgment was recovered against her, by confession, in the same court, by Albert H. Hewes, on the 2d of March, 1878. Executions were immediately issued upon these judgments, and levies made upon the chattels covered by the three mortgages. Albert H. Hewes assigned his judgment to the complainant immediately after its recovery. No consideration was paid for the assignment. The complainant and Frederick Fisher knew, when they received the mortgages made to them, that Mrs. Hewes had previously executed a mortgage to Mr. Hoag. They are subsequent mortgagees with notice of the antecedent mortgage.

Neither of the complainant's securities is founded on a debt actually existing at the time it was obtained. Both were given for the same purpose. The complainant had become surety for Mrs. Hewes, on a bond given by her to the ordinary, in 1874, on obtaining a letter of guardianship for one of her children. The mortgage executed to him, and the judgment recovered by him, were intended, as he testifies, to secure him against loss in consequence of his contract of suretyship for her. Prior to getting these securities, he had paid nothing on account of that contract; he neither paid anything, nor expressly bound himself to stand as principal in that contract, at the time he obtained these securities, and he has paid nothing since, nor incurred any new or additional obligation. The mortgage and judgment were without other consideration than the complainant's contingent liability as such surety. No debt actually existed at the time they were obtained, and none has subsequently been created. In the papers, the complainant has styled himself trustee of Mrs. Hewes's ward, but his act, in this respect, as a matter of law, is a mere piece of assumption. As surety of the guardian, he had no authority to constitute himself trustee of her ward, and thus, in virtue of his own act, without paying anything, or binding himself to bear the whole burden of her obligation, put himself in a position where he is entitled to be recognized against other lienholders, as a creditor invested with the rights of the ward. While Mrs. Hewes remained guardian, she was the sole representative of the ward, and her sureties had no right, in virtue of their liability for her, to assume the position of creditors against her in respect to her ward's estate.

The mortgages, it will be observed, were filed in different counties — those given to the complainant and Mr. Fisher having been filed in Hudson, and that given to Mr. Hoag, in Essex. The chattels mortgaged were, at the time the mortgages were executed, in the county of Essex. The residence of the mortgagor is in dispute; but the evidence, I think, leaves little ground for diversity of opinion as to where it must be adjudged to have been. The mortgagor's husband died in 1873. At the time of his death his residence was in Kearney Township, Hudson County. The mortgagor, after his death, continued to occupy the house in which he had resided. She spent portions of each winter thereafter, up to the winter of 1876 and 1877, in the city of Newark, sometimes taking a house, and at others three or four rooms, but keeping her dwelling in Kearney open, and she and her family going there whenever they chose. She continued to reside in her house in Kearney during the whole of the winter of 1877 and 1878, and on the day Mr. Hoag's mortgage was executed, she walked from her house in Kearney to Newark to execute it. If it be taken as true that, when she executed this mortgage, she declared Newark to be the place of her residence (the weight of the evidence does not, however, I think, establish the fact that such a declaration was made), still, I cannot see how this fact can affect the rights of the complainant. The question as to him is, not what did she say respecting the place of her residence, at the time she executed that mortgage, but where, in fact, did she then reside. His rights must be controlled by the fact, and not by her representation. The evidence shows, conclusively, that she resided in Hudson County when all three mortgages were executed.

It is clear, then, that Mr. Hoag's mortgage was not filed in the county where he was required by law to file it, in order to give it validity against the creditors of the mortgagor, and against subsequent purchasers and mortgagees in good faith. The law upon this point is plain and imperative. Unless a mortgage is filed in the county where the mortgagor resides (if a resident of this State) at the time of its execution, or the mortgagee takes immediate possession of the mortgaged chattels, and continues in the actual and constant possession of them, it is absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith. Rev. p. 709, §§ 39, 40; *De Courcey* v. *Collins*, 6 C. E. Gr. 357.

The complainant is clothed with a dual character; he is both a creditor and a subsequent mortgagee. He is not, however, a subsequent mortgagee in good faith. He knew, when he took his mortgage, that a prior mortgage had been given, and any attempt by him to dislodge that mortgage from its position of superiority, in consequence of the failure to file it in the proper county, is, in equity, an act of bad faith. His mortgage must therefore be awarded a position subordinate to that held by the mortgage to Mr. Hoag. He stands, however, as a judgment creditor, on a much higher plane. The Statute makes an

important distinction between creditors and subsequent purchasers or mortgagees. Purchasers or mortgagees, to be in a position to avail themselves of an omission by an antecedent mortgagee, must have acted without notice of the rights of the holder of the antecedent security; but not so with creditors. A creditor may know that an antecedent mortgage has been given, yet if it is not filed according to the requirement of the Statute, and he obtains a judgment and procures a levy to be made, his lien, by force of the Statute, is entitled to preference in payment. This is the rule plainly prescribed by the Statute. Had the meaning of the Statute ever been thought to be open to doubt, its construction is now so authoritatively settled as to be no longer open to discussion in this court. *Williamson* v. *N. J. Southern R. R. Co.*, 2 Stew. Eq. 336; s. c. 1 Stew. Eq. 278.

To what extent, then, is the complainant a creditor? Is he entitled to that position in virtue of both of his judgments, or only one? The judgment he holds under assignment from Albert H. Hewes does not seem to be open to any valid objection. It was founded on a just debt, actually existing at the time it was confessed. The defendant Hoag cannot impeach the complainant's title because he paid nothing for it. The judgment creditor had an unquestionable right to assign it, with or without a consideration, just as he pleased. That is a matter which concerned him alone. The fact that the assignment was gratuitous, is only important as it may serve to show whether the foundation of the judgment was honest or fraudulent. Under the evidence, there can be no doubt that it is supported by a just debt.

As already intimated, the complainant's right to occupy the position of a judgment creditor, as against other lien-holders, under the judgment confessed to himself, has little to support it in a court of equity. Is he a creditor in the sense in which that term is used in this Act? It is certain that no debt was due to him for which he could have maintained an action. At the time of his recovery, he had no legal or just cause of action against the defendant. At common law, a judgment may be confessed to secure a debt to be subsequently created, but suppose the consideration promised, is never furnished, would a court of equity permit the judgment to be collected, or give such a judgment creditor a superior position against an unfiled antecedent mortgage, the existence of which was known to him when he obtained his judgment?

Besides, I think I am bound to consider the doctrine as settled, so far at least as this court is concerned, that a judgment on bond and warrant of attorney, under our Statute, can only be entered for a debt actually existing at the time of its entry, and that a simple liability as indorser or surety does not constitute such a debt. "It is an abuse of language to say," says Chancellor Halsted, "that because I indorse your note to-day, payable three months hence, to be used by you, you are indebted to me to-day for the amount of it." *Blackwell* v. *Rankin*, 3 Hal. Ch. 160. But the decisive authority on this point is the judgment of the Court of Errors and Appeals, in *Clapp* v. *Ely*, 3 Dutch.

555. It will be remembered that, in that case, it was finally held, by a divided court, it is true, after repeated and exhaustive discussion by counsel as able as any that ever adorned the bar of this State, and after the best consideration that could be given by the court to any case, that a valid judgment could not be entered, under our Statute regulating the recovery of judgments by confession on bond and warrant of attorney, to secure future advances, or a debt to be subsequently created. A single quotation from the masterly opinion of Chief Justice Green will present the important ruling of that case, which, I think, must control this. He says: "Under the law of this State, no judgment by confession can be entered, except for a demand founded on a legal consideration, and for a debt justly due and owing at the time of the entry of the judgment." These considerations, I think, effectually dispose of the complainant's claim to be regarded as a judgment creditor, as against the other lien-holders, in respect to the judgment confessed to himself.

But if it were possible to hold that the complainant was entitled to be treated as the holder of a valid security for future advances, it is not perceived how that would give him the least advantage in this controversy. The general rule in respect to such securities is well established. They are only entitled to priority over subsequent encumbrances to the extent of the sums actually advanced prior to actual notice of the subsequent encumbrance. *Ward* v. *Cook*, 2 C. E. Gr. 93; *Kline* v. *McGuckin*, 9 C. E. Gr. 411. Here nothing, up to this time, has been advanced, and the complainant cannot, therefore, in equity, lay claim to the rights of a creditor.

This disposes of the case so far as it involves merely the rights of the complainant and Mr. Hoag, and without reference to the rights of Mr. Fisher. But his rights must also be considered. He took his mortgage with notice that a prior mortgage had been given to Mr. Hoag, and he must, therefore, as between Hoag and himself, take the subordinate position. But he and complainant, as between themselves, occupy equal rank; the judgment of the one, and the mortgage of the other, were recovered and filed on the same day. So that the relative positions of the several parties are as follows: The complainant and Fisher, as between themselves, hold concurrent liens, but Hoag stands prior to Fisher as between Fisher and himself, and the complainant, as between Hoag and himself, stands prior to Hoag. In this condition of affairs, it is impossible to give the complainant the full benefit of the superiority of his position over Hoag, without advancing him to the front against everybody. The fact that the complainant's position is superior to that of Hoag, and that Fisher's is subordinate to that held by Hoag, raises the complainant above Fisher as well as Hoag. Where a third encumbrancer acquires a right of priority as against the first, but the act or omission from which such right flows does not change his relative position towards the second, yet, as it is impossible to put him in advance of the first, without also advancing

him over the second, his lien must, of necessity, be advanced to the first position as against both the first and the second encumbrances. *Clement* v. *Kaighn*, 2 McCart. 47.

The decree will declare the liens of the parties to stand in the following order: The complainant shall be first paid the amount due on the judgment assigned to him by Albert H. Hewes; the defendant Hoag shall next be paid the amount due on his mortgage; and, lastly, Fisher shall be paid the amount due on his mortgage. If a surplus remains, it must be brought into court to await the determination of the question whether the complainant or Mrs. Hewes is entitled to it.

On appeal from a decree advised by the *Vice-Chancellor*, and reported in *Sayre* v. *Hewes*, 5 Stew. Eq. 652.

On the 3d of December, 1877, the appellant, Hoag, obtained a chattel mortgage on the goods in question. This mortgage was not recorded in the proper county; it was to secure $2,150. On the 14th of February, 1878, Frederick Fisher, having knowledge of the prior mortgage, took a second mortgage on the same property to secure $1,160. Edward Sayre holds a judgment by confession against the mortgagor for $6,000 debt and $4 costs, which was entered on the 27th of February, 1878. Execution on this judgment was duly taken out and levied.

Messrs. Field, for appellant.

Messrs. Coult and *Howell*, for respondents.

The opinion of the court was delivered by

Beasley, C. J. I agree with the Vice-Chancellor in his settlement of the disputed facts in this case, but it seems to me that an error has crept into the decree with respect to the marshalling of the encumbrances. These liens are of this character: the mortgage first in date is held by the appellant, Hoag; then comes a mortgage held by Frederick Fisher, one of the defendants; and lastly is the judgment of the defendant Sayre. This first mortgage was not recorded in the proper county, and therefore is subordinate to the judgment, but it is paramount to the second mortgage, which was taken with knowledge of the existence of this first lien. In this state of things, the decree places the judgment and the first mortgage, by way of preference, before the second mortgage. This, as it seems to me, is unjust and inadmissible.

Upon what possible principle is the result in this case to be justified? Fisher, when he took his mortgage, knew that there was an antecedent mortgage on the same property, securing the sum of $2,150, with interest. He had his own mortgage duly recorded, so that it became incontestably the second legal lien; in this position of affairs this judgment is entered, and he at once finds himself, without any fault on his part, degraded from the position of a second encumbrancer to that of a third encumbrancer, and instead of the mortgaged property being subject to a claim prior to his own of but $2,150, it is subject to para-

mount claims which amount to the sum of $5,150. If such a principle be correct, it does not appear that any person, under any circumstances, can take a second or other subordinate mortgage upon property, without putting his interests in the utmost jeopardy. Under the prevalence of such a rule of law, a subsequent encumbrancer would be obliged to see that the *status* of the primary encumbrance was, in all respects, unexceptionable, under penalty, if a flaw should be detected, of having his lien superseded by every judgment that might be entered at a later date. Such a rule would be as inexpedient as it would be unjust.

I cannot but think that any one who will look carefully into the subject will perceive that no rule applicable to such a juncture as this can be admissible that is not founded on the theory of leaving the second mortgagee in the position originally acquired by him, without respect to the neglects or shortcomings of the holder of the previous mortgage or the subsequent judgments of creditors. Viewed in this aspect, this would be the result: the judgment creditor would, in the marshalling of these liens, take priority over the first mortgage; as between the judgment and that mortgage, the former must be first paid. But with respect to the second mortgage, the judgment creditor, as such, has no claim to stand first, his only claim in that regard being his right to stand in the shoes of the first mortgagee, and assert all the privileges incident to that position. But he can exact nothing further than such privileges; he can legally say that he has the paramount lien on the property to the extent of the sum secured by the first mortgage; but he cannot legally say that, with respect to the second mortgagee, he has any paramount lien beyond this. No additional burden can be put upon the land to the detriment of the second mortgagee. If the judgment be for a sum greater than that secured by the first mortgage, then, by right of representation, such judgment will constitute the first lien to the full extent, and no further, of the first mortgage; if it be for a less sum than the first mortgage, it will take precedence and consume the first mortgage to that extent only. It will be observed that by these adjustments the priority of the first mortgage, with regard to the second mortgage, will be exhausted, either partially or wholly, so that, to the extent of such exhaustion, it will be postponed to the second mortgage.

The doctrine thus propounded is but the development of the principle maintained and acted on in *Clement* v. *Kaighn*, 2 McCart. 48. In that case there was a judgment without an execution; then a mortgage, and then judgments on which executions had been taken out. These latter judgments were entitled to precedence over the first, but were subordinate to the mortgage. Chancellor Green decided that the first judgment on the mortgaged premises, by reason of the failure to sue out execution upon it, should be postponed to the encumbrance of the junior judgments, and, as an inevitable consequence, that it should be postponed to the mortgage which was prior to the junior judg-

ments, and whose priority was not to be affected by any laches of the holder of such prior judgment.

In my opinion, the decree in this case should be modified so as to direct the payment of these encumbrances in this order, viz.: first, the judgment of Sayre to the amount secured by the first mortgage; second, the payment of the residue of such judgment and the second mortgage, *pari passu*, as they were concurrent liens, being entered on the same day; third, the payment of the first mortgage.

DIXON, J., dissenting.

I agree with the conclusions which the Vice-Chancellor has reached upon the facts.

But I dissent from the legal rule by which he fixes the order of priority, for I do not think it necessary to advance the complainant Sayre to the front against everybody, in order to give him the full benefit of his superiority to Hoag.

Nor do I assent to the rule laid down in the opinion just read, since I see no reason for regarding the complainant as substituted in the stead and rights of Hoag as against Fisher, merely because Hoag failed to comply with the registry laws. The effect of non-compliance with those laws is declared by themselves to be, not that the rights of him in default shall be transferred to the subsequent encumbrancers, but that his claim shall be void as to them.

Therefore, if there be three encumbrancers, A, B and C, in the order of time, and A's lien be prior to B's, and B's to C's, but, for A's omission to properly register his lien, it is void as to C's, then the fund should be disposed of as follows: —

1. Deduct from the *whole fund* the amount of B's lien, and apply the balance to pay C. This gives C just what he would have if A had no existence.

2. Deduct from the *whole fund* the amount of A's lien, and apply the balance to pay B. This gives B what he is entitled to.

3. The balance remaining after these payments are made to B and C is to be applied to A's lien.

To illustrate: Suppose the fund to be $5,000; A's lien to be $3,000; B's lien to be $1,000, and C's lien to be $2,000. Then, C receives $5,000, less $1,000 = $1,000; B receives $5,000, less $3,000 = $2,000; A receives $5,000, less ($1,000 + $2,000), = $2,000.

Or suppose the fund to be $5,000, and each of these encumbrances to be $5,000; then it will appear that A, the first in time, will take it all; since, except for the registry laws, he would clearly be entitled to it, and the registry laws simply prevent his taking anything by which C's security may be lessened. But C's security was nothing at the beginning, for B's prior lien covered the whole fund; and C, therefore, has no right by which A's claim can be impaired.

Where B's and C's claims are concurrent in time and lien, but A is prior to B, and void as to C (as in the present case), the distribution should be as follows: —

1. Divide the *whole fund* in the proportion of B's and C's claims, and give to C his proportion. Thus A is ignored in fixing C's rights.

2. Deduct from the *whole fund* the amount of A's lien, and apply the balance to B's claim.

3. The balance remaining after both payments goes to A.

By applying these rules to the case before us, it will be seen that, in my judgment, Fisher alone is injured by the decree below; but as he is not a party to this appeal, the decree cannot be changed here for his sake, and therefore, I think, should be affirmed.

For affirmance — DIXON — 1.

For reversal — BEASLEY, C. J., DEPUE, KNAPP, MAGIE, PARKER, REED, SCUDDER, VAN SYCKEL, CLEMENT, COLE, DODD, GREEN — 12.

BOOK XI.

CONVERSION AND ELECTION.

CHAPTER I.

CONVERSION.

KETTLEBY *v.* ATWOOD.

CHANCERY. 1685, 1687.

[*Reported* 1 *Vern.* 298, 471.]

BY articles made upon marriage it was agreed, that the wife having £1,500 portion, the husband should add £500 more to it, and that the same should be deposited in trustee's hands, until a convenient purchase could be found out for investing the same in land; which land, when purchased, was to be settled to the use of the husband and wife for their lives, remainder to the first and other sons of their two bodies in tail, remainder to their daughters in tail, with a remainder over to the right heirs of the husband. And in the articles there was a proviso, that in case the husband died without issue, the wife might make her election, whether she would have the land or money, and had six months time to make her election.

The husband died before any purchase was made, leaving the wife *enseint* of a daughter, born soon after his death, who died at a month old. The wife was administratrix both to her husband and child, and made her election within the six months to have the money, and gave notice thereof to the plaintiff, who was her husband's brother and heir.

The bill was brought by the plaintiff to have the £2000 invested in lands and settled according to the articles.

LORD KEEPER [GUILFORD]. Had a bill been brought in the life-time of the infant (it being better and safer for the infant to have had land than money), I would have decreed the money to be laid out for the benefit of the infant: but I do not see, what equity the heir has against the administratrix. The bill was dismissed, but without costs.

This cause came on to be re-heard, and the question now was between the wife and the heir on the part of the husband, who should

have the money after the death of the wife; the wife being administratrix both to her husband and her child: and the court decreed for the heir, that the money was bound by the articles, and should be for the benefit of the heir, as the land should have gone, in case the money had been laid out according to the articles: and the case of *Whittick* and *Jermin* was cited, which had been lately decreed by this Chancellor [Jeffreys], and was a case in point; and the Chancellor said, he remembered the case of *Lawrence* and *Beverley* upon a special verdict before the Lord Ch. Justice Hales, in which himself was of counsel, and was there ruled, that the money was not assets to satisfy a creditor, but was bound by the articles.

In the arguing of this case it was insisted for the defendant, that the wife by the articles had an election, in case her husband died without issue, whether she would have the land or the money, and had six months time to make his election after the death of the husband; and although the husband had issue at his death, yet that issue died within the six months, and therefore the wife might elect. *Sed non allocatur*, for the husband having issue at his death, he could not be said to die without issue; so no election could arise to the wife. And the case of *Goodier* and *Clark* was cited in Siderfin, part 1, fo. 102.[1]

CHICHESTER *v.* BICKERSTAFF.

Chancery. 1693.

[*Reported* 2 *Vern.* 295.]

The plaintiff was brother and heir to Sir John Chichester deceased, who married Sir Charles Bickerstaff's daughter, and by articles on the marriage, Sir Charles was to pay one thousand five hundred pounds in part of the portion, which together with one thousand five hundred pounds more, to be advanced by Sir John, within three years after the marriage, was to be invested in lands, and settled on Sir John, for life, his intended wife for life, to first and other sons in tail, remainder to daughters, remainder to Sir John's right heirs. Sir John and his lady within a year after the marriage, fall sick of the small-pox, the wife dies first, and Sir John in three days after, without issue; Sir John having made a will, and the defendant Sir Charles executor; and devised the residue of his personal estate after debts, &c. paid, to the defendant Frances Chichester his sister.

The plaintiff's bill was to compell the defendant Sir Charles, to pay him the one thousand five hundred pounds, insisting that by virtue of the marriage articles, the money ought to be looked on and considered in equity as land, and therefore belonged to him as heir to his brother.

[1] See *Walrond* v. *Rosslyn*, 11 Ch. D. 640 (1879).

PER CURIAM. This money, though once bound by the articles, yet when the wife died without issue, became free again, and was under the power and dispose of Sir John, as the land would likewise have been, in case a purchase had been made pursuant to the articles, and therefore would have been assets to a creditor, and must have gone to the executor or administrator of Sir John; and this case is much stronger where there is a residuary legatee, and therefore dismissed the bill.

Money shall in many cases be considered as land, when bound by articles in order to a purchase, but whilst it remains still money, and no purchase made, the same shall be deemed as part of the personal estate of such person, who might have aliened the land in case a purchase had been made.[1]

SWEETAPPLE *v.* BINDON.

CHANCERY. 1706.

[*Reported* 2 *Vern.* 536.]

W. B. DEVISED £300 to her daughter Mary, to be laid out by her executrix in lands, and settled to the only use of her daughter Mary and her children; and if she died without issue, the lands to be equally divided between her brothers and sisters then living. The plaintiff married Mary the legatee, and had issue by her; but she and her child being both dead, and the money not laid out in land, the bill was, that the plaintiff might either have the money laid out in lands, and settled on him for life, as being tenant by the curtesy, or in lieu of the profits of the lands might have the interest of the money during his life.

PER CURIAM. [LORD KEEPER COWPER.] If it had been an immediate devise of land Mary the daughter would have been, by the words in the will, tenant in tail, and consequently the husband would have been tenant by the curtesy; and in the case of a voluntary devise, the court must take it as they found it, and not lessen the estate or benefit of the legatee: although upon the like words in marriage-articles it might be otherwise, where it appeared the estate was intended to be preserved for the benefit of the issue; and therefore decreed the money to be considered as lands, and the plaintiff to the interest, or proceed thereof, for his life, as tenant by the curtesy.

[1] See 1 W. & T. L. C. in Eq. (6th ed.) 979, 980.

SEELEY *v.* JAGO.

CHANCERY. 1718.

[*Reported* 1 *P. Wms.* 389.]

ONE devised that £1000 should be laid out in a purchase of lands in fee, to be settled upon A., B. and C. and their heirs, *equally to be divided;* A. dies leaving an infant heir; and B. and C. together with the infant heir, bring a bill for this £1000.

LORD CHANCELLOR. [LORD COWPER.] The money being directed to be laid out in lands for A., B. and C. *equally* (which makes them tenants in common), and B. and C. electing to have their two thirds in money, let it be paid to them; for it is in vain to lay out this money in land for B. and C. when the next moment they may turn it into money, and equity, like nature, will do nothing in vain.

But as to the share of the infant, that must be brought before the master, and put out for the benefit of the infant, who, by reason of his infancy, is incapable of making an election. Besides that such election might, were he to die during his infancy, be prejudicial to his heir.[1]

SCUDAMORE *v.* SCUDAMORE.

CHANCERY. 1720.

[*Reported Prec. Ch.* 544.]

THE Lady Jane Scudamore, by her will in 1696, gave the sum of £8000 to her daughter Mrs. Prince, to be laid out by her in a purchase of lands, to be settled to the use of herself for life, with remainder to John Scudamore, and his heirs; and in case he died in the lifetime of the said Mrs. Prince, to the Lord Scudamore, his heirs, executors, and administrators. John Scudamore died in the year 1714, and in the lifetime of Mrs. Prince. The Lord Scudamore likewise died in the lifetime of Mrs. Prince, in the year 1716, having about three months before his death made his will, and the plaintiff his lady executrix, and having given several legacies to the other plaintiffs, and leaving the defendant Frances Scudamore, his only daughter and heir at law, an infant; and in the year 1717 Mrs. Prince died, and the money had never been laid out: and now this bill was brought by the plaintiff against the Lady Frances, heir at law, and against the executors of Mrs. Prince, to have the money for the benefit of the executors and

[1] See *Ashby* v. *Palmer*, 1 Mer. 296 (1816).

legatees of the Lord Scudamore, and that no purchase might be made for the benefit of the defendant, the heir at law of Lord Scudamore.

Lord Chancellor [Lord Macclesfield] was clear of opinion, and decreed accordingly, that the money belonged to the defendant the heir at law, as the lands would have done if a purchase had actually been made, as it ought to have been, by Mrs. Prince the trustee; and that to decree it otherwise would be to put it into her power and election which of the two should have it; for if the purchase had been made, it must have gone to the heir; but if she, by delaying the purchase, may alter the right, and give it to the executors, this would be to make it her will, and not the will of the first testator, which would be very unreasonable and inconvenient; and therefore, though the trust for laying out the money was personally confined to Mrs. Prince, without nominating executors, yet they were implied and included in it; and this case was the stronger, because the heir at law of Lord Scudamore was an infant, and as Mrs. Prince survived my lord two years, the infant heir might have brought her bill against Mrs. Prince herself, the trustee, to have had the purchase made, and her laches in not doing it is not to turn to her prejudice, being an infant. The cases cited were *Linguen and Souray*, Prec. Ch. 400, in Lord Harcourt's time, and a case lately decreed of *Jones* cont' *Powell.*

Note. — In this case it was agreed by my Lord Chancellor to be a declared rule in this court, that if money be devised to be laid out in the purchase of lands, to be settled on one and his heirs, that the person himself, for whose benefit the purchase was to be made, may come into this court, and pray to have the money itself, and that no purchase may be made, because none have an interest in it but himself; but if he dies before the purchase made, or payment of the money, so that the question comes between his heirs and executors, which of them shall have the money, the heir shall be preferred, and it shall for his benefit be considered in a court of equity, as if the purchase had been actually made in the life of his ancestor, for two reasons: 1st, Because the heir is to be favored in all cases, rather than the executors, who by the old law were to have nothing to their own use. 2d, If the executor should have it, it would be against the words of the will, which gave it to the heirs.[1]

[1] See *Craig* v. *Leslie*, 3 Wheat. 563 (1818).

CURLING *v.* MAY.

CHANCERY. 1734.

[*Reported* 3 *Atk.* 255.[1]]

A. GIVES five hundred pounds to B. in trust that B. should lay out the same upon a purchase of lands, or put the same out on good securities for the separate use of his daughter H. (the plaintiff's then wife), her heirs, executors and administrators, and died in 1729. In 1731, H. the daughter died without issue before the money was vested in a purchase; the husband as administrator brought a bill for the money against the heir of H., and the money was decreed to the administrator, for the wife not having signified any intention of a preference, the court would take it as it is found; if the wife had signified any intention, it should have been observed, but it is not reasonable now to give either her heir or administrator, or the trustee, liberty to elect; for LORD TALBOT [C.] said, it was originally personal estate, and yet remained so, and nothing could be collected from the will, as to what was the testator's principal intention.[2]

FLETCHER *v.* ASHBURNER.

CHANCERY. 1779.

[*Reported* 1 *Bro. C. C.* 497.]

JOHN FLETCHER, by his will, devised his burgage houses and free rents, in Kendall, and all his personal estate to trustees and the survivor, and the heirs, executors, and administrators of such survivor, in trust to sell so much as should be sufficient to pay his debts, and then to permit his wife Agnes to enjoy the residue during her life, if she so long continued his chaste widow; and after her decease, to sell and dispose thereof, and the money arising thereby, after deducting charges, and half a guinea each to the trustees for their trouble, to pay to, and between his son William and daughter Mary, share and share alike, provided that if his wife should happen to marry again, the trustees should, immediately after the marriage, sell all the estate and effects given to her for her life, and, after such deductions as aforesaid, should pay the remainder of the money to and amongst his wife, his

[1] This case is stated in the argument for the plaintiff in the case of *Guidot* v. *Guidot*, 3 Atk. 254 (1745).

[2] Cf. *Earlom* v. *Saunders*, Ambl. 241 (1754); *Polley* v. *Seymour*, 2 Y. & C. Ex. 708 (1837).

son William, and daughter Mary, share and share alike, equally; and in case either his son William, or his daughter Mary should die before his or their legacy should become due, that the share or legacy of him or her so dying should go to the survivor of them: The testator died leaving Agnes his widow, William his only son and heir at law, and Mary his daughter; Agnes, by the custom of burgage tenure, was entitled to hold the burgage houses in Kendall during her chaste viduity, against the disposition of her husband by will; Mary attained twenty-one, but died unmarried in the life of her mother and brother. William was twenty-one at the death of the testator, and died without issue in the life of his mother; the mother died the widow of the testator: upon her death a bill was filed by the heir at law of William and John the testator, against the trustees and the personal representatives of the testator and of the widow, to have a conveyance of the real estates devised by the will, to the plaintiff, the heir at law. The representative of the widow, who was the sole next of kin of William the son, by answer, claimed the property as personal; alleging that by the direction to the trustees to sell the real estates, they become as personal property, and as such, were to go to the personal representative of William the son, who survived his sister.

The cause was heard the 11th December, 1778, where the first objection taken was that the personal representative of William was not before the court.

But the Master of the Rolls was of opinion there were sufficient parties to sustain the question; that the personal representative was a mere formal party, and that, if he thought proper to make a decree, a personal representative might be brought before the master.

Mr. Madocks and *Mr. Wilson*, for the plaintiff.

Mr. Kenyon and *Mr. Chambre*, on behalf of the defendants, the executors of the widow.

In June, his Honor [Sir Thomas Sewell] gave his opinion; he observed that nothing was better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given: whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund or the contracting parties may make land money, or money land. The cases established this rule universally. If any difficulty has arisen, it has arisen from special circumstances. In the case of *Sweetapple* v. *Bindon*, 2 Vern. 536, it was determined that a husband was entitled to money to be laid out in land as tenant by the curtesy, and although it is held that a wife is not entitled to dower in a similar case, yet it is allowed that it is so held because cases

have been determined, and not from any principle. The cases of land to be turned into money are fewer than those of money to be employed in the purchase of land. The principal cases have been where real estates have been directed to be sold, and some part of the disposition has failed, so that something has resulted to the heir at law, as in case of *Emblyn* v. *Freeman*, Pre. in Cha. 541; and *Cruse* v. *Barley* and *Banson*, 3 P. Wms. 20. These are all cases where a devise has failed, and the thing devised has not accrued to the representative or devisee, but to the heir at law of the testator. The case of *Durour* v. *Motteux*, 1 Ves. 320, is a strong case to the point now before the court; and if anything could strengthen the general rule, the circumstances of the present case would do so. The testator has blended the real and personal estate together, and disposed of them, without distinction, for the benefit of his wife and children. Both real and personal estate are made one fund. In the case of *Durour* v. *Motteux*, Lord Hardwicke made this a principal ground for considering the whole fund as personal estate. In the present case, it might be uncertain, till the death of the widow, whether the estates must not be absolutely sold: both the children, indeed, died before her; but she might have married before the death of one or both. The interests of both the children were vested, subject, as to one of them, to be defeated in case either of them died before the mother. There could be no election to take the fund as land or money; for where an estate is directed to be sold, and the money divided among several persons, none has a right to say that any part shall not be sold; the question therefore is merely between the real and personal representatives of the son, whether the personal representative shall take the fund as personal property, according to the will, or the heir at law shall take it, as if no will had been made. The case of *Flanagan* v. *Flanagan* is a strong authority that it shall be taken as personal estate, according to the will. In that case the testatrix, Sarah Wooley, by will, dated 28th March, 1749, gave and devised all her real and personal estates to Francis Plumtree, in trust, in the first place, out of her personal estate, as far as it would extend, and, in the next place, by sale of her real estate, or a sufficient part thereof, to raise so much money as should be sufficient to pay her debts and legacies; and after payment thereof, in trust to convey the residue of the real estate, which should remain unsold, and pay the produce of such part as should be sold, and all other the residue of her real estates, between her father James Flanagan, and her brother James Flanagan, their heirs, executors, and administrators, equally. A bill was brought, by the creditors, for sale of the real estate, to supply the deficiency of the personal estate for payment of debts; and a decree was made for a sale; and if any of the money to arise by the sale should remain after payment of the debts and legacies, it was directed to be paid to James Flanagan the father, and James Flanagan the son, equally; and if any estate should remain unsold, the trustees were directed to convey it to them and their heirs equally: after the decree, James Flanagan the son

died, leaving a daughter, and a son born after his death; part of the estate was sold, and afterwards James Flanagan the grandfather died, leaving his grandson his heir, and his grandson and granddaughter his sole next of kin: after the death of the grandfather, a further part of the estate was sold, under an apprehension that the produce of the first sale was insufficient to pay the debts and legacies: it appeared, however, that the produce of the first sale was sufficient. A bill was, afterwards, brought by the son of James Flanagan the son, claiming a moiety of the surplus, as the real estate of James Flanagan his grandfather, to whom he was become heir against the personal representative of his grandfather, and against the daughter of James Flanagan the son, who claimed a moiety as one of the next of kin of her grandfather. It was objected, that the second sale, after the death of the grandfather, was improper. The court determined, that the second sale, actually made under the decree of the court, before the master, could not be considered as improperly made: that there was no fraud, no practice, and that the money ought to go to the personal representative of the grandfather. The case of *Digby* v. *Legard*, 3 Cox, P. W. 22, note, is a different question. There the testatrix (Elizabeth Byerley) directed her real estates to be sold to pay debts and legacies, and gave the residue to five persons, to be equally divided between them, one of whom (Lady Cayley) died in her lifetime. It was resolved that the devise, so far, failed totally, and should accrue to the heir at law. The language of the decree is such, that the benefit of the devise to Lady Cayley should accrue to the testatrix's heir at law. Mr. Jervoice, who was a lunatic, and should be paid to his committee, as real estate descended to him. The case of *Scudamore* v. *Scudamore*, Pre. in Cha. 543, shows that, in all cases where the dispute is between representatives, the heir, or executor, shall have the fund according to the will or contract of the persons who gave or created it. There was a case of *Ogle* v. *Cook*, heard 19th February, 1748, which was this: Mr. Ogle made his will in 1744, and gave his real estate to trustees to sell, and to vest the money in stock, and pay the interest to his wife during her widowhood, and after her death, or marriage, to his two daughters equally, except that the eldest was to have £1000 more than the other: he gave the residue of his personal estate in the same way: he afterwards conveyed the real estate to one of the trustees named in his will, to whom he was considerably indebted, in trust to sell so much as should be necessary to pay the debt, and as to the residue in trust for Mrs. Ogle: part of the estate was sold, and then Mr. Ogle died. His youngest daughter died in his lifetime. The bill was brought by the widow and the eldest daughter, against the son, who was the heir, and the trustees, to have the residue of the estate sold, and claiming the share of the youngest daughter, as personal estate of Mr. Ogle, to be divided between them and the son, as his next of kin. The son insisted the conveyance to the trustee was a revocation of the will; and, if not, that the share of the dead daughter was to be con-

sidered as real estate of Mr. Ogle, and descended to him as heir. It was determined that the conveyance was a revocation only *pro tanto*, to let in the debt; and that so much of the estate as remained unsold should be sold, and that the money raised, or to be raised by sale of the estate, made part of the personal estate of Mr. Ogle. There was another case about the same time, which is in 1 Ves. 174, *Cunningham* v. *Moody*, where, by marriage articles, £500 was agreed to be laid out in purchase of lands, to be settled to the use of the husband for life, with remainder to trustees to preserve contingent remainders, with remainder to the wife for life, with remainder to the children of the marriage, as the husband and wife should appoint; and in default of a joint appointment, as the survivor should appoint; and in default of any appointment to the children, to be equally divided among them, if more than one, as tenants in common, in tail general, with cross remainders; and if but one, to that child in tail general, and no appointment was made. The father and mother being dead, and the daughter being married, the trustees paid the £500 to her and her husband, and they received it as money, and executed a release. The daughter had a child, which died, and she afterwards died without issue. A daughter of the settlor by a second marriage filed a bill against the husband, representative of his wife, the daughter by the first marriage, for the £500, considering it as land; and it was observed that she was entitled to the money, but that the husband of her deceased sister was entitled to the interest, during his life, as tenant by the curtesy. In the present case, William Fletcher, the son, had the whole beneficial title vested in him as money, subject to his mother's interest for life or widowhood. She was his sole next of kin, and her personal representatives are now entitled to the estate as money; the bill must therefore be dismissed, without costs.

ACKROYD *v.* SMITHSON.

CHANCERY. 1780.

[*Reported* 1 *Bro. C. C.* 503.]

CHRISTOPHER HOLDSWORTH, by his will, gave (*int. al.*) to the defendants, Smithson and Ibetson, their executors and administrators, £200 in trust to put the same out at interest, and to apply the interest in bringing up the defendant, Mary Bracklebank, then an infant, till 21, the principal to be paid to her at 21, and if she died before 21, then to be paid to her representative; and bequeathed to the Rev. Thomas Whitaker £100, to James Roberts and William Roberts £100 each, to Grace Ogle £200, to George, Ann, and Phœbe Ogle, her children, £100 each, to Joseph Scurr £200, to Benjamin Wright £200, to Mrs. Molyneaux £400, to Hannah Close £150, to William Hawkeswell

£100, to Mary Ross £200, to Joseph Marshall £200, all which legacies, together with other legacies given by his will, he directed to be paid at the end of six months after his decease; and the said testator, thereby, gave all his messuages, cottages, lands, tenements and hereditaments, situate at the Bank, in the township of Leeds, with their appurtenances, and all his real estate, not thereinbefore devised, and all his household goods and furniture, plate, linen, stock in trade, and all his personal estate whatsoever, unto the defendants Smithson and Ibetson, their heirs, executors, administrators, and assigns, to hold the same to them, their heirs, executors, administrators and assigns forever, in trust that they should, as soon as convenient after his decease, sell all his said messuages, &c. for such price or prices as could be got for the same, and thereby to convert such real and personal estate, so to them devised, and every part thereof, into ready money, and by and out of the money arising by such sale to pay all his debts, legacies, and funeral expenses, and charges of proving his will; and after payment thereof, and retaining to themselves £50 each, which he thereby gave them for their trouble, in trust out of such moneys to arise as aforesaid, to pay all legacies and annuities thereby bequeathed, at the time and in the manner thereby directed; and if, after all such payments made, and putting out of the funds as thereby directed, for raising the annuities thereby given, and indemnifying his trustees from all charges, expenses, and loss which might attend the carrying the trusts of his will into execution, there should remain an overplus in the hands of the trustees, which he apprehended there would be to a considerable amount, he directed that they, and the survivors of them, should, within six months after the same should be ascertained, pay the same unto his said legatees, Thomas Whitaker, James Roberts, William Roberts, Grace Ogle, George Ogle, Ann and Phœbe Ogle, Joseph Scurr, Benjamin Wright, Mrs. Molyneaux, H. Close, William Hawkeswell, Mary Bracklebank, Mary Ross, and Joseph Marshall, in *proportion to their several and respective legacies therein to them bequeathed*; and the testator thereby willed and devised that two several sums of £250 each, which he had therein directed to be put out on securities in the names of his trustees, and the interest arising therefrom to be respectively paid to M. Thackeray and R. Grant during their respective lives, should upon the several deaths of them the said M. Thackeray and R. Grant, be paid in the like proportions unto them his said several and respective legatees.

Benjamin Wright and Mrs. Molyneaux died in the lifetime of the testator.

The bill was filed by the next of kin of the testator, against the surviving legatees, and the heir-at-law; claiming the legacies given to the deceased legatees, their shares in the overplus, and in the two sums of £250 as lapsed, and become part of the personal estate of the testator.

The cause came on at the Rolls, 10th July, 1778, when, his Honor

(*Sir Thomas Sewell*) being of opinion that the surviving legatees took the whole residue, in proportion to their several legacies, dismissed the bill without costs.

From this decree, the plaintiffs appealed to Lord Chancellor [Thurlow]; and the cause coming on to be heard before his Lordship, —

Mr. Kenyon attempted to support the decree —

But Lord Chancellor, being clear (without hearing much argument) that this was a tenancy in common in the residue, and that therefore the shares of the legatees who died in the testator's lifetime were undisposed of, said the only question was whether such shares belonged wholly to the next of kin, or to the heir-at-law.

The Attorney-General, *Mr. Madocks*, and *Mr. Selwyn* (for the plaintiffs, the next of kin), contended — that the testator had converted his real estate into money, out and out, that he had mixed two funds, and made all personal estate; that the cases therefore of *Mallabar* v. *Mallabar*, For. 79, and *Durour* v. *Motteux*, 1 Ves. 320, must govern the decision here, and that the blending the funds distinguished this case from that of *Digby* v. *Legard*, 3 Cox P. W. 22, note. Mr. Selwyn mentioned the cases of *Flanagan* v. *Flanagan*, cited 1 Bro. C. C. 500, *Fletcher* v. *Ashburner*, 1 Bro. C. C. 497, and *Ogle* v. *Cook*.

Lord Chancellor thought the two former cases did not apply; but being, in general, of opinion with the counsel for the next of kin, asked the counsel for the heir-at-law, upon what grounds they could support his claim.

Mr. Scott, for the heir-at-law, said they claimed on his behalf such interest in the moneys produced by the sale of the testator's real estates, as the deceased residuary legatees would have been entitled to, if they had survived the testator; or so much of their shares of the overplus, now in the events which have happened, undisposed of, as is constituted by the produce of the testator's real estate. That the heir-at-law is entitled to every interest in land, not disposed of by his ancestor, is so much of a truism that it calls for no reasoning to support it. It is not necessary for the heir-at-law to deny that the intention of the testator has designed him nothing; his intention has certainly been equally unpropitious to his next of kin; but it is not enough that the testator did not intend that his heir should take, he must make a disposition in favor of another; if he has not actually disposed of all his real estate, if he has not made an universal heir, the law will give such part of his real estate as he has not actually and eventually disposed of, even against his intention, and *a fortiori* in a case where he has expressed no intention, to the *hæres natus*. If the interest of the deceased legatees had been an interest in the produce of mere real estate, not blended with the produce of personal estate, it has been admitted, upon both hearings, that the benefit of the lapsed devises would, according to the case of *Digby* and *Legard*, and the principle of the case of *Emblyn* and *Freeman*, Pre. Chan. 541, and of many others, have accrued to the heir-at-law. It is admitted, and

cannot be denied, that where a testator directs real estate to be sold for special purposes, if any of those purposes become incapable of taking effect, the heir-at-law shall take; because there is an end of the disposition when there is an end of the purposes for which it was made: but it is contended here that the testator had not a special intention, but that he meant the produce of his real estate should be considered as personal estate, that he intended to convert it out and out, that he has not kept the funds distinct, but that he has blended them so as to be incapable of being distinguished, and that the cases therefore of *Durour* v. *Motteux*, and *Mallabar* v. *Mallabar*, are authorities in point, that the whole fund is personal. We admit that a person may decide what shall be the nature of his property after his death, so as to preclude all question between real and personal representatives. But we insist that if he has not actually and eventually so decided, they upon whom the law casts the title to personal estate can no more claim in a court of equity, money arising from the sale of land, than the heir can claim property admitted to be of a personal nature. As to the question of fact, whether he meant that in some event only, or that in all events the produce of his real estates should be considered as personalty, we admit that in favor of his residuary legatees, he meant to convert the whole into personalty in case all his residuary legatees should eventually take the whole; but we contend that he has intimated no intention as to that part of the produce, as to which his disposition, in the event which has happened, has failed of effect. He converts it out and out, indeed, if you speak of his intention as to the qualities of the property which his legatees were to take; but as to such part of the property as, in the event, they have not taken, he has not determined upon its nature: he never meant to determine upon its nature, as between his heir-at-law and his personal representative or next of kin, because he appears not to have adverted to the possibility of any events taking place which would give the one or the other an interest in his property, and he designed no part of his property for either. In the event, the one or other must take some part of it; but to say he has made it all personal property, and that therefore the law must give it to the next of kin, is to apply an argument deduced from what was the testator's intention in case events had taken place which have not occurred, for the sake of proving a similar intention, if circumstances happened directly contrary to those with relation to which only the testator framed his intention. To argue from what the testator intended with respect to residuary legatees, by way of proving that he intended the same in favor of his next of kin, is to reason from a case in which intention is expressed, to prove a like intention in a case which supposes the absence of intention: though the testator therefore intended, that his legatees, if they had lived, should take their respective shares of such part of the general surplus as was produced by the sale of the real estates as money, he has not declared any intention relative to its nature in case that particular event of his

should be disappointed. In the event, therefore, which has happened, it is so much undisposed of, arising from the sale of lands. Such money in this court is land; and, as such, the heir claims it. Suppose all the fifteen legatees had died in the lifetime of the testator, would it not have been competent to the heir-at-law to have insisted, in equity, that no sale should be made of the real estate? Would it have been possible to contend that, because the testator had blended the funds, in order to make a disposition which never took effect, and without a view to any other given circumstances, that he had therefore blended them, if, in the event, he had made no disposition; that because he had made the real estate personal to give it to his residuary legatees, and to disappoint his heir, he meant also to disappoint his heir, whether his residuary legatees did or did not, in the event, take the benefit of that disposition? The fact of his having blended the funds proves not a mere inattention, not mere indifference to the interests both of his next of kin and his heir-at-law, but it proves a purpose hostile to both: can that fact then be a ground, from whence to infer that, in a change of circumstances, he had a purpose of kindness and bounty to the next of kin, and adverse to the interest of the heir only? The reason of the intention ceasing, the intention should be taken to have ceased. The testator meant to change the legal qualities of his property, when he meant to alter the disposition which the law would make of his property: but if, in the event, the law was to make the disposition of any part of the property, — he meant, for aught that appears to the contrary (and something must appear to the contrary to defeat the claim of the heir), that the law which made the disposition, should decide on the qualities of the property of which it was to dispose. If then, in case all the residuary legatees had died, the heir could have prevented a sale, — is it to be said, that because a sale must be made, he shall not have that part of its produce which the objects of the testator's bounty cannot take? It is not true, that where it is necessary that a sale should be made to effectuate the testator's purposes, which are capable of taking effect, that such sale will convert the nature of that part of its produce which cannot be applied according to the testator's intention. In the case of *Emblyn* and *Freeman*, Pre. Chan. 541, the heir was held entitled to £200 arising from the sale of real estate, which the testator had made liable to an appointment by note, concerning which he had made no appointment; and there a sale was necessary. In the case of *Digby* v. *Legard*, 3 P. W. 22, note, where the heir was held entitled to the benefit of the devise lapsed by the death of one of five tenants in common of money, to be raised by sale of real estates in the lifetime of the testator, the heir could not possibly prevent a sale. As to the cases of *Mallabar* and *Mallabar*, and *Durour* v. *Motteaux*, they can be considered as authorities only by those who do not attend to the distinction submitted above: they are so far from deciding the case, that they establish no principle which applies to it. In *Mallabar*

and *Mallabar*, the real and personal estate are not blended by the terms of the devise in the beginning of the will, which is a devise of real estate only, upon trust to sell: and that out of the moneys arising therefrom, the testator's debts should be paid, and after payment thereof, he devised, out of the remainder of the money, £500 to his sister Mary Bainbridge, £500 to his sister's two children, that should be living at the time of his decease, equally to be divided between them; £500 to his nephew Nicholas, who was his heir-at-law; £500 to be divided amongst the children of his late brother, James Mallabar, living at his decease; then follows the clause which was held to blend the funds. "*Item*, after all my debts and legacies paid, I give and bequeath all the rest and residue of my personal estate unto my sister Esther Mallabar:" and appoint her executrix. The question was, whether there was a resulting trust for the heir, as to the money arising from the sale of the real estate, after payment of the debts, and the several sums of £500. The court held that the testator had made all his property personal, or rather it inferred from the purpose of the testator, as far as that could be collected from the will, that the testator meant by the residuary clause to describe not only money strictly personal estate, but the money claimed by the heir likewise; the court inferred this from the circumstance of the heir's having a legacy of £500 out of that very money, and because, if a different construction was made, the sister his executrix, to whom the testator clearly intended to give a beneficial interest, would have taken nothing but a troublesome office; for, if the words, "the residue of the personal estate," did not include this money, the personal estate must have been first applied, to pay the debts and legacies, in exoneration of the real estates charged therewith by the will, and the executrix would have had an office of trouble without the benefit intended her: but though the court considered the surplus of the money as personalty, as between her, whom it held to be a residuary legatee, and the heir, to effectuate the testator's intention, does it follow, that if the testator had died intestate as to the surplus, as the testator here did as to a part of it, that the court would have determined against the heir in favor of the next of kin, in whose favor no such argument as to intention could have been urged? If the residuary legatee had died in the testator's lifetime, the will must have had the same construction as if the residuary clause had not been inserted; for where the residuary clause has no operation to any substantial purpose, it cannot be considered as a part of the will: if it had not been inserted, the devise of the real estate would have been a devise to pay debts and legacies merely; in such case, then, it is clear that, as to the surplus, there would have been a resulting trust for the heir. The debts and the sums of £500 being paid, the testator's intention would have been satisfied, to the extent in which it could take effect; there would then have been an end of the disposition. There is no difference between such a case, and the present case, except that in that case there is no residuary legatee as to any part of the

surplus; here there is none as to some part of it; there, then, is a general intestacy, as to the surplus, here a partial intestacy: but the effect of a partial intestacy must be the same, as to the part, as the effect of a general intestacy is to the whole. The case of *Durour* and *Motteux* is also a case between residuary legatees and the heir-at-law; there, the testator gave all his real estates to sell and dispose of the whole with his personal estate, blending them, for payment of his debts, legacies and funeral expenses, and performance of his will; he gave several legacies, and among the rest, £1200 or thereabouts, whereof part was to be laid out in the purchase of freehold lands for charitable uses, some of which were, confessedly, within the Mortmain Act, and the rest determined to be so; the question was, whether the £1200 should go to the heir-at-law or to the residuary legatees. Lord Hardwicke said, that he was of opinion, that the money which should arise by the sale of the real estate was turned into personal, and so intended by the testator, it plainly appearing, that by the description of all his personal estate, he meant to include the whole in the residue, so that it is to be considered now as personal estate; then it comes to this, a will is made, in which there are several legacies, and the residue of the personal estate is given away; one of the personal legacies is void by law; the court cannot say, for that reason, that he intended to die intestate, for giving the residue over includes everything, let it fall in by reason of the legacies being void, or lapsing in the life of the testator. Now, here, the reasoning of the court is grounded upon the testator's intention to give his residuary legatees everything which was not otherwise effectually disposed of. And the testator was held to have converted his real estate out and out into personal estate, to effectuate that intention; for the residuary legatees could not otherwise take the £1200. But if the residuary legatees had died in the lifetime of the testator, and the next of kin had been called upon to sustain the question against the heir, the reasoning of the court would not apply: arguments from intention, in their favor, could not be resorted to, and the court might have said, and must have said, that the testator meant to die intestate as to the surplus, if there was no residuary legatee named in his will living at his death. It could not, in that case, have been said, that the testator meant, by the description of all his personal estate, to include the whole in the residue, and therefore the void legacy of £1200 among the rest; because the will, in that case, must be considered as if nothing concerning the residue had been inserted in it. Here he meant to make one fund of the whole, to effectuate his intended disposition of the whole; but if subsequent events defeated that disposition, his intention, in case it took effect, is no proof that he had the same intention in case it did not take effect. If there had been no residuary clause, and if the residuary legatees had been dead, it could have no effect, and therefore could not have been attended to. In *Durour* v. *Motteux*, it would have been nothing more than a devise of real and personal estate for payment of debts, valid legacies, and

funeral expenses; it would have been then a disposition with a special intention; that intention being satisfied, there would have been a resulting trust as to the surplus. It is said, if this way of reasoning was good, it would have entitled the heir to the £1200 in the case of *Durour* v. *Motteux*, for it was the testator's intention there, that the same sum should be considered as money only, in case the charity took it; that the testator never adverted to the event which happened, viz. the residuary legatee's taking it, an event which he as little thought of as he did of the next of kin's taking the residue. The answer is, the rule of law would not suffer in that case what no rule forbids in this; the law says, where there is a residuary legatee, the testator shall be presumed to mean that he should take whatever lapses, either by the death of the legatees, or whatever is not given according to law. So long as there is any person to take, who is declared by the testator to be preferred by him to those whom the law appoints to succeed him, the heir can have no claim. If the testator spoke for himself, he would say, if my special intention of kindness to the charity fails, my general intention of bounty to my residuary legatee shall take place: but where the residuary legatee is removed, there is nothing like a declaration, by the testator, in favor of the next of kin, to entitle them to succeed the residuary legatees, as there is where there is a general residuary clause in a will in favor of the persons named in it to succeed the particular legatees; and to money arising by the sale of land, there can be no claim, in the next of his kin, but what arises from the declaration of the testator; for unless he directs, or expresses, that it shall be considered as personalty, the heir must take it. We admit the heir then to be excluded whilst there are any persons who can take the produce of the real estate under the will, the declaration of the testator's intention: we deny that he is excluded by any who make their claim not under the will, but in defect of the will; or that the intention in the will can affect those who claim, upon the ground that there is no will which relates to the subject. The case of *Cruse* v. *Barley and Banson*, before Sir Jo. Jekyll, 3 Wms. 20, seems to establish those principles; for it shows, that where any part of the produce of the real estate is so given, as to prove that it was not the testator's intention, in case that part should lapse, that it should go to the residuary legatees, but that he has given them the residue exclusive of that part, it shall not go as undisposed personalty to the next of kin. Why should the next of kin take in preference to the heir what the residuary legatees cannot take for another reason, namely, removal by death? The case was, William Banson, seised in fee of freehold and copyhold lands, which he had surrendered to the use of his will, and being much indebted by mortgages, and having a wife and five children, devised all his freehold and copyhold lands to the defendant Barley and his heirs, in trust to sell for the best price, and in the first place to pay off all his encumbrances and his debts. He also devised his personal estate to the same trustee, in trust to sell, and after the testator's debts paid, to

apply the money arising by sale of the personal estate, and also the money to be produced by sale of the real estate, among his five children, in manner thereinafter mentioned: To his eldest son £200 at his age of 21; all the rest and residue thereof among his four younger children at 21, and with benefit of survivorship; the eldest son died under 21: the question was, what was to become of the £200. The Master of the Rolls thought it would not go to the younger children, who were only to have the residue, but to the heir. It was objected that all is made personal estate; the surplus of the money arising from the sale of the real and personal estate, is to go to the *hæredes facti*. There could be no doubt, it was urged, if the eldest son had died in the testator's life, it would have been a lapsed *residuum:* But his Honor, after looking into precedents, declared for the heir, that it was the same as if so much land, as was of the value of £200 had not been to be sold, but suffered to descend. As to the case of *Flanagan* v. *Flanagan*, it is perfectly different from this: That was a question between the real and personal representative of a person entitled under the will of the testator. The land was sold under a decree of the court, in a cause in which the person, through whom both claimed, was party; and the decree had ordered the surplus, if there should be any, to be paid to James Flanagan the father and James Flanagan the son equally. The sale was made under the decree; and the question arising between the real and personal representative of Flanagan the father, the court determined the surplus should have the same nature, with respect to them, as the decree had given it with respect to Flanagan the father. In that case, too, the testator had, foreseeing that a sale could not be made, which would produce the exact sum and no more, directed his trustees to convey the residue of the real estate, which should remain unsold, or pay the produce of such part as should be sold, and all other the residue of his real estates, between the father and the son. *Scudamore* v. *Scudamore*, Pre. Ch. 513, is not to this point: it determines that the representatives of a person entitled under a will shall take money, as money or as land, according as the person whose representatives they are would have taken it; but it decides nothing between the heir and personal representative of the testator himself. There is no case in which the next of kin have been considered as entitled against the heir, in the event of a lapse of the whole, or a part of the residue, except the case of *Ogle* v. *Cook*, heard 19th February, 1748, which, so far as it relates to this subject, was thus: Mr. Ogle made his will in 1744, and gave his real estate to trustees to sell, and vest the money in stock, and pay the interest to his wife during her widowhood, and after her death, or marriage, the principal to his two daughters equally, except that the eldest was to have £1000 more than the other: he gave the residue of his personal estate in the same way. He afterwards executed a conveyance in trust to sell, for payment of his debts, which was held a revocation *pro tanto* only, and part was sold. One of the daughters died in Mr. Ogle's life. The bill

was brought by the widow, and the eldest daughter, against the son, the heir, and the trustees, to have the residue of the estate sold, and claiming the share of the deceased daughter, as personal estate of Mr. Ogle, to be divided between them and the son. The son insisted that her share was to be considered as real estate: the court decreed the residue of the estate to be sold, and that the produce should be considered as Mr. Ogle's personal estate. Here, it cannot be denied that the intention of the testator to convert this estate into money, for the sake of his daughters, was taken to be a sufficient ground for the court's considering the moiety, which in the event was undisposed, as personal estate:[1] but the case of *Digby* v. *Legard*, is a later authority, and contradicts the doctrine of that case. The cases are not in any respect different, except in the number of the persons interested in the produce. The daughters, in the case of *Ogle* v. *Cook*, indeed had an interest in the personal, as well as real estate, which was not given in that of *Digby* v. *Legard;* but the funds are kept separate, and not blended in *Ogle* v. *Cook*. The determination in the later case, we submit, is neither justified by principle nor by authority. The case of *Ogle* v. *Cook* admits the deceased daughter's moiety, in both the real and personal funds, to be undisposed, but it supposes that the conversion, which the testator made with a view to disposition, is to take effect, though the disposition does not take effect. Upon the whole, we contend, that, if the shares of the deceased legatees in the

[1] In the case of *Collins* v. *Wakeman*, 2 Ves. Jr. 683, 686, 687 (1795), LORD LOUGHBOROUGH, C., said of *Ogle* v. *Cook*: "I have had the Register's book examined, and it does not stand in contradiction to the other cases. It was particularly circumstanced; but Lord Hardwicke had made no disposition of the surplus arising from the sale of that estate. He considered it as personal property, and could not consider it otherwise, for the only purpose expressed in the decree he actually made. Cook, the testator, directing certain parts of his real estate to be turned into money, and the produce to be laid out in stock, always subject to debts, gave the interest to his wife for life, and after her decease the principal to his daughters; taking notice, that his heir was otherwise provided for, and giving him a legacy of books on condition of paying £500 to his sisters. The testator afterwards conveyed the very estate, that was the subject of the devise, to a creditor, to whom he had assigned a mortgage, that covered the estate devised and a little more. He directed the estate to be sold to pay the debts. It was an absolute conveyance for a sum of money; but, by a defeasance, the person, to whom the estate was conveyed, was directed to account, after satisfying the debts, to Cook himself. The question was, whether the devise was not revoked. Lord Hardwicke held it not revoked by the deed, which in fact did what the testator had by his will directed to be done. But the bill states, that without carrying into execution all the purposes of the agreement and reducing the whole into money there was not sufficient to pay the debts and legacies. Therefore Lord Hardwicke only decreed, that the remainder after satisfying the particular debts should be taken as part of the personal estate, and directed an account of the personal estate, including in it the produce of the real, and an application; and he reserved the consideration of what should be done with the surplus till after the report. Therefore the only point, which applies to that string of cases, was left undecided. Consequently it does not stand in contradiction to them; and I am perfectly satisfied, that where the court has no direction from the testator, to whom the money arising from any part of his real estate shall go, it rests with his heir-at-law."

overplus are undisposed, parts of those shares being constituted by money arising from the sale of real estate, the heir is entitled to such part; that the intention of the testator, in the events that have happened, does not destroy his claim; and that this is a case to which the principles of the adjudications cited by the counsel for the next of kin do not apply.

The Chancellor reversed the decree, and directed an account to be taken of the personal estate, and the money arising from the sale of the real estate, and that the share of the deceased legatees, in the overplus, should be divided between the next of kin and the heir; that is, so much of those shares as was constituted of the personal estates, to the next of kin, and so much as was made up of the produce of the real estate, to the heir. He said that he fully approved the determination in *Digby* v. *Legard*. That he used to think, when it was necessary for any purposes of the testator's disposition, to convert the land into money, that the undisposed money would be personalty; but the cases fully proved the contrary. It would be too much to say, that, if all the legatees had died, the heir could, as he certainly might, be said, prevent a sale: and yet to say that, because a sale was necessary, the heir should not take the undisposed part of the produce. The heir must stand in the place of the residuary legatees who died, as to the produce of the real estate. He said he approved the distinctions made in behalf of the heir, and decreed as before.[1]

TOWNLEY *v.* BEDWELL.

Chancery. 1808.

[*Reported* 14 *Ves.* 591.]

By the master's report under an order of reference to state encumbrances it appeared, that a lease had been executed in 1795 by the testator in this cause to Townley for thirty-three years; with a proviso, that, if Townley, his executors, administrators, or assigns, should be desirous to purchase the premises within six years, he, his executors, administrators, or assigns, should pay to the testator, his heirs or assigns, £600 for the purchase upon having a good title made to him, Townley, his executors, administrators, or assigns.

The testator died before the expiration of six years from the date of the lease. After his death, and within that period, Townley declared his option to purchase, according to the proviso.

[1] See *Cogan* v. *Stephens*, 5 L. J. N. S. Ch. 17 (1835). Cf. also *Hutcheson* v. *Hammond*, 3 Bro. C. C. 128 (1790); *Fitch* v. *Weber*, 6 Ha. 145 (1848); *Court* v. *Buckland*, 1 Ch. D. 605 (1876).

The master's report also stated an agreement for a lease to Pratt; with a proviso for a covenant, that, if at any time after the ground should be covered with houses by the tenant, he, Pratt, his executors, administrators, or assigns, should be minded to have all or any part made freehold, the testator, his heirs, executors, &c. would make a title; the value to be fixed by two persons: one to be appointed by the testator: the other by Pratt. In pursuance of that agreement a lease was granted in 1791 for ninety-nine years.

A petition was presented by the heir-at-law; praying to be let into possession; and to have the rents, accrued, paid to him out of court. No option to purchase had been declared as to the premises demised to Pratt.

Mr. Fonblanque and *Mr. Bell*, in support of the petition.

The Lord Chancellor. [Lord Eldon.] This precise question was decided at the Rolls by Lord Kenyon; holding, that upon such a contract by a lessee, for liberty to purchase the freehold and inheritance within a certain period at a limited price, from the death of the lessor the rent went to the heir; but the money, when the purchase was claimed, belonged to the executor.

Sir Samuel Romilly, *Mr. Wetherell*, and *Mr. Heald*, for the next of kin.

The Lord Chancellor observed, as to the premises, demised to Pratt, that until the option declared, which ascertains, whether the estate is ever to be converted, the rents and profits must go according to the freehold title; and it was admitted by the counsel for the next of kin, that the prayer of the petition, that the heir may be let into possession, could not be resisted.

The Lord Chancellor. The case to which I alluded yesterday is *Lawes* v. *Bennett* [1 Cox, 167 (1785)], which according to my own note was this.

A person, named Witterwronge, in 1758 demised to Douglas for seven years; with a covenant, that, if after the 29th of September, 1761, and before the 29th of September, 1765, Douglas should choose to purchase the inheritance for £3000, Witterwronge would convey accordingly. Witterwronge died in 1763: no election having been then made by Douglas; and left all his real estate to John Bennett; and all his personal estate to Bennett and his sister, equally, as tenants in common. In 1765, before the 29th of September, Waller, who had purchased the lease and the benefit of the agreement from Douglas, called upon Bennett, the devisee of the real estate, to convey upon payment of £3000. The bill was filed in 1781 by Lawes, the husband of Bennett's sister, against the personal representative of Bennett, the brother, claiming a moiety of the £3000 and interest; and Lord Kenyon made the decree accordingly; observing, that, though Witterwronge could not have compelled Douglas to purchase, the money was at the time of the election declared to be considered as the personal estate of the testator; and did not belong to the devisee of the real estate.

That case was very much argued; and I do not mean to say that a great deal may not be urged against it; but, where there is a decision precisely in point, it is better to follow it.

Therefore the rents of the premises demised to Pratt and the rents of the other premises, demised to Townley, until the option, declared by him, belong to the heir; and from the time of that option Townley is entitled to the latter; and must be charged with interest upon his purchase-money; which money and interest are personal estate of the testator; and go to his next of kin.[1]

SMITH *v.* CLAXTON.

CHANCERY. 1819.

[*Reported* 4 *Mad.* 484.]

THOMAS SMITH by his will, 1st April 1811, after making certain specific bequests to his wife Margaret Smith, bequeathed all other his personal estate and effects of what nature or kind soever unto P. Hisilton and Thomas Stephenson (two of the defendants), their executors, &c.; and devised all his freehold messuages, dwelling-houses, tenements and hereditaments, situate in the town of Stokesley, unto the use of Hisilton and Stephenson, their heirs and assigns, upon trust, as soon as might be after his decease, to sell and dispose of his said real and personal estate and effects for the best price that could be reasonably had or gotten for the same; and directed his trustees, and the survivor, &c. to stand possessed of the money to arise and be produced by the sale, upon trust, to pay such debts as he might owe at the time of his decease, his funeral expenses, and the following legacies; viz. to his wife £40, to be paid immediately upon his decease; to his son Thomas Smith £10, to be also paid immediately after his decease; to his son Joseph Smith (a defendant) £300; to his son Robert Smith £1,000; and to his niece Mary Potter £40. The three last legacies to be paid at the end of six calendar months after his decease, without interest, if they should be living, but not otherwise. And, upon further trust, to pay testator's nephew-in-law Thomas Caxton, £40, to be paid at the age of 21 years, and subject thereto and to the provisos in his will; upon trust, to pay the ultimate residue or surplus to his wife, her executors, &c. And the testator by his will further gave and devised all his other freehold closes or parcels of ground in the township or parish of Stokesley, known by the name of Mill Riggs, unto Hisilton and Stephenson, their heirs and assigns, upon trust, to receive the profits thereof, and to pay the same to his wife during her

[1] See *Edwards* v. *West*, 7 Ch. D. 858 (1878).

life; and after her death, during the life of his son Thomas, to pay the same into his proper hands, &c.; and after his said son's decease, that his said trustees should stand seised of the said closes, upon trust, to sell the same, and to apply the money arising by the sale to and amongst Robert the son of the said testator's son Thomas, and all and every other child or children of his said son Thomas lawfully to be begotten, in equal shares, to be considered a vested interest in them respectively as and when they should attain twenty-one; but if his said grandson, and all other the children of his said son Thomas thereafter to be born, should die before any of them attained twenty-one years, unmarried, and without issue, then the money to arise by the sale of the said closes should be in trust for the testator's sons Joseph and Robert (in equal shares), their executors, &c. And the testator further gave certain other freehold estates, and certain leasehold estates, to the same trustees upon trust, to pay an annuity of £27 to his son Thomas during the life of his wife, and subject thereto to pay the rent and profits to his son Robert for his life; and after the death of Robert to sell the same, and apply the produce for the benefit of the children of Robert in manner therein mentioned; and if there should be no children of Robert, then the money to arise from the sale should be in trust for his the testator's sons Thomas and Joseph, in equal shares, their executors, &c.

The testator died 29th February 1816, and left surviving Thomas Smith his eldest son and heir-at-law; and also his two other children Margaret Smith and Joseph Smith; but the testator's wife, and his son Robert, and also his grandson Robert (the son of the testator's son Thomas), died in the lifetime of the testator. The legacies bequeathed to them having lapsed, the other specific and pecuniary legacies and debts charged upon the testator's freehold estate, in aid of his personal estate, were very small, and were paid out of his personal estate, which was more than sufficient for the payment of the same.

Thomas Smith, the son, died 14th June 1816, without issue, having previously made his will, but not attested so as to pass real estates in favor of the plaintiff, his wife, and others; and the wife filed the present bill to obtain a decision as to the effect of the will of Thomas Smith the elder, and the questions were: —

1st. Under the first devise, Whether, as the debts and legacies were paid from the personal estate, and the wife was dead, Thomas, the heir of the testator, took the estates, as land which descended to his heir; or as money, which passed to his personal representative?

2d. Under the second devise, Whether, as the testator's son Robert had died in his lifetime, the moiety of the produce of the sale, which was given to him, and being lapsed by his death, vested in Thomas as the heir of the testator, was to be considered as land descending to the heir of Thomas; or as part of the personal estate of Thomas?

3d. Under the third devise, Whether the moiety of the produce of the sale, which Thomas the heir took by limitation, upon failure of

Robert and his children, was also to be considered as land descending to the heir of Thomas; or as part of the personal estate of Thomas?

Mr. Bell and *Mr. Willis*, for the plaintiff.

Mr. Sugden, for the executors of Thomas Smith and son, in the same interest.

Mr. Wetherell and *Mr. Wilbraham*, for the defendant Joseph Smith.

The case was afterwards re-argued, as to the first devise only, by *Mr. Sugden* and *Mr. Wilbraham*.

The Vice-Chancellor. [Sir John Leach.] The inaccuracy of some expressions, which are to be found in the books, has created much of the difficulty which arises in cases of this kind. I have anxiously considered every authority which has been referred to; and my endeavor has been to extract from them certain general principles which may admit of clear application. Where a devisor directs his real estate to be sold, and the produce to be applied to particular purposes, and those purposes partially fail, the heir-at-law is entitled to that part of the produce which in the events is thus undisposed of. The heir-at-law is entitled to it, because the real estate was land at the devisor's death; and this part of the produce is an interest in that land not effectually devised, and which therefore descends to the heir. It is for this reason that the produce of an estate, which the devisor directs to be sold, can never be strictly part of his general personal estate. If a devisor directs such produce to be paid to his executors, and applied as part of his personal estate, the executors take it as devisees. Every person, taking an interest in the produce of land directed to be sold, is in truth a devisee, and not a legatee. A devisor may give to his devisee either land, or the price of land, at his pleasure; and the devisee must receive it in the quality in which it is given, and cannot intercept the purpose of the devisor. If it be the purpose of the testator to give land to the devisee, the land will descend to his heir; if it be the purpose of the devisor to give the price of land to the devisee, it will, like other money, be part of his personal estate. Under every will, when the question is, whether the devisee or the heir failing, the devisee takes an interest in land, as land or money, the true inquiry is, whether the devisor has expressed a purpose that, in the events which have happened, the land shall be converted into money? Where a devisor directs his land to be sold, and the produce divided between A. and B. the obvious purpose of the testator is, that there shall be a sale for the convenience of division; and A. and B. take their several interests as money, and not land. So, if A. dies in the lifetime of the devisor, and the heir stands in his place, the purpose of the devisor, that there shall be a sale for the convenience of division, still applies to the case; and the heir will take the share of A. as A. would have taken it — as money, and not land. But in the case put, let it be supposed that A. and B. both die in the lifetime of the devisor, and the whole interest in the land descends to the heir; the question would then be, whether the devisor can be considered as having ex-

pressed any purpose of sale applicable to that event, so as to give the interest of the heir the quality of money. The obvious purpose of the devisor being, that there should be a sale for the convenience of division between his devisees, that purpose could have no application to a case in which the devisees wholly failed, and the heir would therefore take the whole interest as land.

To apply these principles, which I apprehend to be the true result of all the authorities, to the present case: Under the first devise, the estate is directed to be sold, and the produce applied in aid of the personal estate, in payment of debts and legacies; and the surplus is given to the wife. The debts and legacies are fully paid out of the personal estate; and the wife dies in the testator's lifetime. The whole interest thus resulted to Thomas the heir; and the devisor's purpose of sale being plainly for a distribution, according to the will, has no application to the events which have happened, and Thomas took the estate as land, which descends in that character to his heir.

Under the second devise, there is an obvious purpose of sale for the convenience of division between the sons of Thomas, or failing them, between the devisor's sons Joseph and Robert. The only son of Thomas, and the devisor's son Robert, both die in the devisor's lifetime, and Thomas the heir becomes entitled, by lapse, to the moiety of the produce intended for Robert. The purpose of sale for convenience of division still applies to the events which have happened, and this moiety is not land, but personal estate of Thomas the heir.

Under the third devise, there is the same obvious purpose of sale; first, for a division between the children of Robert; and failing, then between Thomas the heir and Joseph. There were no children of Robert, but the purpose of sale remains; and this moiety also is not land, but personal estate of Thomas the heir.

Under both these last devises, Thomas the heir might, by agreement with his brother Joseph, have elected to take his interest as land, but no such point is raised in the pleadings, nor are there any facts before the court to that effect.[1]

WRIGHT *v.* ROSE.

CHANCERY. 1825.

[*Reported* 2 *S. & St.* 323.]

THE bill stated that Joseph Wright was seised in fee of a freehold estate; that he borrowed £300 from James Rose, the defendant, and secured the repayment of it, with interest, by executing a mortgage deed of the estate, with a power of sale; and that, by the terms of the

[1] See *Davenport* v. *Coltman*, 12 Sim. 588, 610 (1842); *Attorney-General* v. *Lomas*, L. R. 9 Ex. 29 (1873).

deed, it was provided that the surplus moneys to arise from the sale, in case the same should take place, were to be paid to Wright, his executors or administrators.[1]

In 1822, Wright died intestate, and without ever having been married. All the interest due on the mortgage money had been duly paid by him up to the time of his death, but the principal remained unpaid. — The interest that accrued due after his death having remained unpaid, Rose, the mortgagee, entered into possession, and afterwards sold the estate under the power of sale, for a sum which considerably exceeded the mortgage money and interest.

Joseph Wright, the mortgagor, was an illegitimate child, and, having died without issue, a claim was set up on the part of the Crown to the mortgaged estate. But, on inquiry being made as to the value of the property, it was found to be subject to the mortgage, and the claim was abandoned: and, after the sale, letters of administration of the estate of Joseph Wright were granted to the plaintiffs.

The bill, after setting forth these facts, and alleging that a large surplus remained in the hands of the defendant, Rose, after satisfying the mortgage debt and interest, prayed that an account might be taken of the moneys produced by the sale, and of the amount due in respect of the mortgage; and that the defendants might be decreed to pay over the surplus to the plaintiffs as the personal representatives of Joseph Wright.

To this bill the defendant put in a general demurrer for want of equity, which now came on to be argued.

Mr. Cooper, for the bill.

Mr. Koe, for the demurrer.

The Vice-Chancellor. [Sir John Leach.] If the estate had been sold by the mortgagee in the lifetime of the mortgagor, then the surplus moneys would have been personal estate of the mortgagor, and the plaintiffs would have been entitled. But the estate being unsold at the death of the mortgagor, the equity of redemption descended to his heir, and he is now entitled to the surplus produce.

Demurrer allowed.[2]

DAVIES *v.* ASHFORD.

Chancery. 1845.

[*Reported* 15 *Sim.* 42.]

By the settlement on the marriage of William and Sophia Davies, dated in January 1802, estates in Radnorshire were conveyed to trustees in trust to sell the same immediately after the marriage, and to

[1] It did not appear on the face of the bill to whom the right of redemption was reserved. — Rep.

[2] See *Bourne* v. *Bourne*, 2 Hare, 35 (1842).

invest the proceeds in certain securities; but no sale was to take place during the lives of Mr. and Mrs. Davies, or the life of the survivor of them, without their, his, or her consent; and the trustees were directed to hold the securities and the estates until they should be sold, in trust for Mr. and Mrs. Davies for their lives successively, and, after the death of the survivor of them, in trust for their children, who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry under it; and, if there should be no such son or daughter, in trust for such person or persons as Mr. and Mrs. Davies, or the survivor of them, should appoint, and, in default of appointment, in trust for the survivor absolutely.

There was no child of the marriage who acquired a vested interest under the settlement. Mrs. Davies died in 1838, without having joined with her husband in making any appointment of the trust property. Mr. Davies, after the death of his wife, consulted his solicitors as to his interest under the settlement, and his right to the possession of it and the title deeds of the estates, none of which had been sold; and they advised him that the beneficial interest in the estates was absolutely vested in him, and that the settlement and title deeds might be safely delivered to him. He died in 1842. The estates and the title deeds were in his possession at his death; but how he became possessed of the latter did not appear. By his will he gave all his personal estate to the plaintiff, subject to the payment of his debts and funeral and testamentary expenses, and charged his freehold estates with the payment of the legacies and annuities thereinafter bequeathed; and, subject thereto, he gave all his estates in Radnorshire and elsewhere to the plaintiff and other persons.

One question in the cause was whether the estates comprised in the settlement were to be deemed real or personal estate of the testator.

Another question was whether the legacies and annuities were payable out of the testator's personal estate, or were charged exclusively upon his real estates.

Mr. James Parker and *Mr. Nevinson*, appeared for the plaintiff.

Mr. Bethell, *Mr. W. M. James*, and *Mr. Freeling*, appeared for the other parties; but

The Vice-Chancellor [Sir Lancelot Shadwell], without hearing them, said: —

I admit that the settlement contained a clear trust for sale, which must have been exercised unless Mr. Davies did some act which showed that he meant the trust to be at an end and to take the estates as land.

It does not distinctly appear in whose custody the title deeds originally were; but it is clear that there was a change in the possession of them, and that Mr. Davies got them into his custody. Now, was not that, of necessity, a destruction of the trust? For the trustees could not have compelled Mr. Davies to deliver up the deeds; and, without doing so, they could not have made any effectual sale of the estates. Therefore,

it seems to me that, by consulting upon his rights under the settlement, and then taking the deeds into his possession (from whom or by what means he obtained them, is immaterial), he made a clear election to take the estates as land.[1]

HOLLOWAY *v.* RADCLIFFE.

CHANCERY. 1857.

[*Reported* 23 *Beav.* 163.]

THE testator, John Radcliffe, the elder, by his will dated in 1832, devised and bequeathed his real and personal estate as follows: —"To my wife Mary Radcliffe, for and during the term of her natural life, she maintaining, educating and bringing up my son John Radcliffe; and from and after the decease of my said wife, I give, devise and bequeath the real and personal estate unto my son John Radcliffe, if he shall be then living, upon his attaining the age of twenty-one years, to hold to him, his heirs, executors, administrators and assigns forever. But in case my son John Radcliffe shall happen to die in the lifetime of my dear wife [which happened], or surviving her, shall die before he attains the age of twenty-one years, then, upon the decease of my wife, or of my son, in case he survives her and dies before he attains the said age, I direct, authorize and empower my executors (Holloway and Jones) to sell; and as to the money to arise from such sale or sales, after payment of all expenses attending the same, I give and bequeath one moiety or equal half part thereof *unto and equally amongst my legal personal representatives*, in such and the like manner as if the same had been to be paid under the Statute of Distribution; and as to the other moiety or equal half part thereof, I give and bequeath the same unto and equally amongst the *legal personal representatives* of my said wife, to be paid in manner aforesaid."

The testator appointed the plaintiff, Holloway, and others executors. The testator republished his will in 1835, and died in 1840.

John Radcliffe the son was the only next of kin of the testator at his death. He married in 1850, and died in 1852, in the life of his mother, who died in 1856. This gave rise to the first question, as to the construction of the gift to the "legal personal representatives."

Another question arose under the following additional circumstances. The property which passed by the first testator's will consisted of personal estate of the value of £1,000, and the following real estate: — 1st, the Egerton Arms; 2d, six cottages in Egerton Street; 3d, a dwelling-house in Brook Street; and four other properties, which it is unnecessary to specify. By a settlement made in 1850, on the mar-

[1] The part of the case which touches the second question is omitted.

riage of John Radcliffe the son, he conveyed the Egerton Arms, the six cottages, and the dwelling-house, specifically (subject to the life estate of the widow) to two trustees and their heirs, to the use of himself for life, with remainder to his wife for life, with remainder to his children as they should appoint, and in default to the children equally in tail.

John Radcliffe made his will in April, 1852, whereby, after reciting his marriage settlement, he devised the real estate comprised therein as therein mentioned. He died in the same year.

There was issue of the marriage one child only, who died two hours after its birth, without having been named.

The real estate had all been sold, and the fund in question consisted of £2,743 10*s.*, being a moiety of the aggregate amount of the sale of the real estate.

After the death of the widow of the first testator, which occurred in January, 1856, a special case was filed to determine the several questions and the rights of the parties to the fund.

Mr. Follett and *Mr. Amphlett*, for Holloway, the executor of the first testator.

Mr. Lindley, for the representative of the widow of the first testator.

Mr. R. Palmer and *Mr. Osborne*, for devisees under the will of the son.

Mr. Lloyd and *Mr. Joliffe*, for the next of kin of the first testator, living at the death of the tenant for life.

Mr. Selwin and *Mr. Freeling*, on behalf of parties claiming under the will of the son.

The Master of the Rolls. [Sir John Romilly.] The questions which arise are, first, whether the persons who are to take under the designation "*my legal personal representatives*" are the persons who were next of kin of the testator at the time of his decease, or the persons who would have been his next of kin if he had died simultaneously with his wife. Secondly. If the next of kin take, then the question arises whether the widow is excluded by the expression used in the will, and if not, then whether she takes one-half or one-third of that moiety. Thirdly. Whether the share of the son in this moiety, if he take any, passes under his will as personal or as real estate. [The Master of the Rolls held that "legal personal representatives" meant those who were next of kin at the testator's death, and that the first moiety passed one-third to the widow, and two-thirds to the son. He then continued]: —

As to the two-thirds which passed by his will to the son, it remains to consider, whether they passed as real or personal estate. The original testator directed the property to be converted into personalty. There is an absolute trust for sale before the division is to be made into moieties. By his will, therefore, in the event which has happened, the real estate was, on the death of the widow, converted into personalty. The question is, whether, as the will of the son devises it specifically, subject to the life estate of his mother, he ought to be treated as

reconverting it into real estate, or as electing to hold and keep his share of it as real estate. The question, however, is settled by my decision, which limits the interest of the son, in the real estate, to two undivided third parts therein. The will of the son was framed in the anticipation that he should survive the widow, and he disposes of the whole, subject to her life estate therein. But the trust for conversion, on the death of the widow, was for the benefit of all the next of kin; and unless they all concurred, in electing to take the property as land, the trust took effect. It would be repugnant to the principles on which the doctrine of conversion and reconversion rest, to hold that one of the legatees of an undivided share in the produce of real estate directed by the testator to be converted into personalty could, without the assent of the others, elect to take his share as unconverted, and in the shape of real estate.

The two-thirds of the son, therefore, passed as personal estate, and as such, in the hands of his executors, are subject to the trusts of his will.

CLARKE *v.* FRANKLIN.

CHANCERY. 1858.

[*Reported* 4 *K.* & *J.* 257.]

BY an indenture, dated 1852, John Clarke appointed and conveyed an estate at Crick, in the County of Northampton, to trustees, to the use of himself for life, with remainder to such uses as he should by deed or will appoint, with remainders over. And by the same indenture he granted and conveyed certain real estate in Clarendon Square, Leamington Priors, of which he was seised in fee, and assigned two sums of £1,000 each secured on mortgage, and certain personal chattels therein mentioned, to trustees: *Habendum*, after and subject to the same estate for life of the said John Clarke, and such power of appointment and revocation therein as was thereinbefore provided and limited respecting the estate and premises at Crick aforesaid, unto and to the use of the said trustees, their heirs, executors, administrators, and assigns, according to the tenure, nature, and quality thereof respectively, upon trust to sell and dispose of the said real estate and personal chattels, and receive the purchase money and the said moneys respectively; and after payment of the costs, charges, and expenses incident to and attending such sale, and collecting and calling in the said moneys, to pay six sums of £50 each and one sum of £20 to certain persons named in the indenture, or to such of them as might be living at the death of the said John Clarke; and upon trust to pay the residue to the minister, churchwardens, and overseers of the parish of Crick, to be by them applied for the charitable purposes in the indenture mentioned.

The indenture was not enrolled pursuant to the provisions of the Mortmain Act, 9 Geo. 2, *c.* 36.

On the same day John Clarke made his will, by which he ratified and confirmed the indenture, and, after making certain pecuniary bequests, he bequeathed all the rest and residue of his personal estate not affected by or included in the indenture, upon trust, after paying thereout all his just debts, funeral and testamentary expenses, to pay the residue to trustees, to be applied and disposed of by them upon such and the like trusts as were mentioned and set forth in the indenture as to and concerning the residue of his real and personal estate therein mentioned.

The testator died in 1855 without issue, and without having exercised the power of revocation and appointment contained in the indenture of 1852.

The bill was filed by his widow, and it prayed to have his real and personal estate administered under the direction of the court, and that the rights and interests of all parties in relation to the real and personal estate comprised in the indenture of 1852 might be ascertained and declared, and the trusts thereof, so far as they were valid, administered under the direction of the court.

By the decree made on the hearing of the cause, it was declared, that the charitable trusts under the indenture of 1852 were void, so far as regarded the real estate and the personal estate savoring of realty.

The cause now came on for further consideration.

Mr. Rolt, Q. C., and *Mr. Lewin*, for the plaintiff, the widow.

Mr. Pemberton, for next of kin.

Mr. Evans, in the absence of the *Solicitor-General*, for the heir-at-law of the grantor.

Mr. Willcock, Q. C., and *Mr. Erskine*, appeared for the trustees, and *Mr. Wickens* for the Crown.

Vice-Chancellor Sir W. Page Wood. It appears to me that this point is governed by authority.

The case of *Griffith* v. *Ricketts*, 7 Hare, 299, is quite in accordance with the previous authorities. What the Vice-Chancellor there says is this: "A deed differs from a will in this material respect. The will speaks from the death, the deed from delivery. If, then, the author of the deed impresses upon his real estate the character of personalty, that, as between his real and personal representatives, makes it personal and not real estate *from the delivery of the deed*, and, consequently, at the time of his death. The deed thus altering the actual character of the property, is, so to speak, equivalent to a gift of the expectancy of the heir-at-law to the personal estate of the author of the deed. The principle is the same in the case of a deed as in the case of a will; but the application is different, by reason that the deed *converts the property in the lifetime of the author of the deed*, whereas, in the case of a will, the conversion does not take place until the death of the testator" (Id. 311, 312). It is not a question of actual physical conver-

sion of the property from real estate into personal property, but, whatever be the time at which that conversion is directed to take place, whether in the grantor's lifetime, or after his death, the grantor, by executing a deed of this description, says, in effect: "From the time I put my hand to this deed, I limit so much of this property to myself as personal property."

That is the actual decision in the case of *Hewitt* v. *Wright*, 1 Bro. C. C. 86. There real estate was limited to the use of the settlor for life, with remainder to trustees, in trust to sell and pay debts and a sum of £2,100, and, after payment of their expenses, to pay and apply the residue as follows: to raise £1,500, and pay the interest to Dorothy Wright, the daughter of the settlor, till she married, and to pay the principal to Dorothy within twelve months after her marriage; and there was a power of revocation. The settlor died without having exercised that power. Then Dorothy died without ever having been married, and the trust as to the principal sum of £1,500 never having taken effect, the question was, whether that sum was personal estate in the grantor and passed by his will? The Lord Chancellor held that it did. "If," he said, "it goes in the case of a will to the heir, in the case of a deed it must result to the grantor; and though, in the case of the will, it cannot go to the executor as money, not having been converted, but must descend to the heir; yet he should think that it was personal estate of the heir, and, if he were dead, would go to his executor" (that has since been decided to be the case); "and if so, where it resulted to the grantor, it would be personalty in his hands, and would pass as such" (Id. 90).

That, therefore, is an express decision, that, notwithstanding the trust for conversion of real estate into personal is not to arise until after the death of the settlor, the property is impressed with the character of personalty immediately upon the execution of the deed, and so much as is undisposed of results to the grantor as personalty.

The doctrine of the converse case of personalty directed by deed or will to be converted into land, is fully discussed by Lord Eldon in *Wheldale* v. *Partridge*, 8 Ves. 227, where, upon the special terms of the instrument, it was held not to be one which upon its execution clothed the property with real uses; but Lord Eldon said, that, but for those special provisions, and if there had been nothing more in the deed, "the property would, *immediately upon the execution of the deed*, have been impressed with real qualities and clothed with real uses, and the money would have been land" (8 Ves. 236); clearly recognizing the rule, that conversion takes effect from the moment of the execution of the deed; and the rights of the parties, and the character in which the property is taken by them, are to be determined according to that conversion.

The principle of these authorities is therefore clearly settled; and where, as here, real estate is settled by deed upon trust to sell for certain specified purposes, and one of those purposes fails, there, whether

the trust for sale is to arise in the lifetime of the settlor or not until after his decease, the property to that extent results to the settlor as personalty from the moment the deed is executed.

The only exception is, where the whole of the purposes for which conversion is directed fail from the moment of the delivery of the deed. In *Ripley* v. *Waterworth*, 7 Ves. 435, Lord Eldon admits, that, where conversion is directed for a particular and special purpose, or out and out, but the produce to be applied to a particular purpose, and the purpose fails, the intention fails, and this court regards the grantor as not having directed the conversion. So here, if at the moment when the grantor put his hand to this deed, the purpose for which conversion was directed had failed, — for instance, if he had given all the proceeds instead of a part to charitable purposes, so that the property would have been at home in his lifetime, the court would have regarded it as if no conversion had been directed, and the property would have resulted to the grantor as real estate. And so in *Hewitt* v. *Wright*, if the only purpose of conversion had been the gift to Dorothy on her marriage, and she had been already dead at the date of the deed without having been married, there again the court would have regarded the grantor as not having directed a conversion.

But here that consideration does not arise. Here some of the purposes for which conversion was directed had not failed when the deed was executed.

It appears to me, therefore, that the property in question resulted to the grantor as personalty.

STEED *v.* PREECE.

CHANCERY. 1874.

[*Reported L. R.* 18 *Eq.* 192.]

By an indenture dated the 29th of May, 1857, certain real estate was assured unto and to the use of Francis Davis and Sarah Preece, their heirs and assigns, in trust for John Preece and Edward Edwin Preece, and the heirs of their respective bodies, in equal shares as tenants in common; and if either of them should die without issue, then as to the entirety of the premises for the other of them and the heirs of his body; and if both should die without issue, then as to part of the real estate in trust for Sarah Preece for life, and after her death for Francis Davis, his heirs and assigns, and as to the residue of the same real estate upon trust for Francis Davis, his heirs and assigns.

Both John Preece and Edward Edwin Preece were illegitimate, and at the date of the deed were infants aged ten and two years respectively.

Francis Davis died in 1866. In 1867 Sarah Preece intermarried with John Steed.

In January, 1868, Mr. and Mrs. Steed filed the bill in this suit against John Preece and Edward Edwin Preece, praying that the trusts of the indenture might be administered by the court; that proper directions might be given as to the letting and management of the trust property; that if it should appear to the court necessary or expedient, a partition of the trust property between the defendants might be directed; and that provision might be made for the costs of the suit.

John Preece attained twenty-one on the 3d of January, 1868. On the 19th of June, 1868, a decree was made which, after declaring that the trusts ought to be administered, decreeing accordingly, and directing an account of the rents and profits, proceeded as follows: "And his Lordship being of opinion that it will be for the benefit of the infant defendant that the premises comprised in the said indenture should be sold, and the defendant John Preece consenting thereto, doth order that the same be sold with the approbation of the judge, the defendant John Preece being at liberty to bid and become the purchaser thereof; and it is ordered that the money to arise from such sale be paid into the bank, with the privity of the Accountant-General of this court, to the credit of this cause, *Steed* v. *Preece*, 1868 S. 1. And his Lordship doth declare that the costs of the said infant defendant are to be a charge upon his share of the said premises. And the further consideration of this cause is adjourned, and any of the parties are to be at liberty to apply as they may be advised."

The property was sold under this decree, and the purchase-money was paid into court.

By an order made in the suit on the 19th of December, 1868, it was ordered that the costs of the suit of the plaintiffs and defendants should be taxed, including in the costs of the defendant John Preece the costs of enrolling the conveyances of the property to the purchasers; that such costs, when taxed (except the said costs of enrolling the conveyances) should be paid out of the purchase-money in court; that out of one equal moiety of the residue of the said purchase-money the costs of enrolling the conveyances should be paid, and that the residue of the said moiety should be paid to the defendant John Preece; and that the remaining moiety of the purchase-money should be invested in bank annuities in trust in the cause, "the account of the infant defendant Edward Edwin Preece;" and that the dividends to accrue on such bank annuities be paid to the guardian of the infant defendant, and be applied towards his maintenance; and liberty to apply was given.

A moiety of the fund remaining after payment of costs was accordingly invested in bank annuities and carried to the account directed by the last stated order. The other moiety was paid out to John Preece.

Edward Edwin Preece died on the 6th of January, 1874, without having attained twenty-one, and without issue.

On the 9th of February, 1874, John Preece executed a deed (which was afterwards enrolled in Chancery), whereby he purported to bar his estate tail in the said fund in court; and he now presented a petition asking for payment of the fund to himself.

By direction of the court, the petition was served on the Attorney-General.

Mr. Blackmore, for the petitioner.

Mr. Hemming, for the Attorney-General, was not called upon.

Sir G. Jessel, M. R. This particular case does not raise all the questions which have been argued.

The facts are very simple. Two persons, one an infant, the other adult, are entitled in equity to real estate as tenants in common in tail, with cross-remainders between them. A suit is instituted by trustees for administration of the trusts of the instrument under which these persons are entitled, and a decree is made in this form: — [His Honor read the decree.] Under that decree the estate is sold, and the purchase money paid into court; and by the order on further consideration one half of the fund in court is paid to the adult, and the other half is carried over to the ordinary separate account of the infant; and under these circumstances the infant would have been absolutely entitled to that moiety if he had attained twenty-one. The infant, however, died under twenty-one; and thereupon this petition is presented by the adult to have the money paid to him.

The petitioner says that, notwithstanding the decree and order I have mentioned, the proceeds of sale must be treated as realty; that he, being originally tenant in tail in remainder, has barred his estate tail, and is now absolutely entitled to the fund. But the answer to that is simple: the estate has been sold and turned into money in a suit to which he, being an adult, was party, and that too, so far as the decree is concerned, by his consent. He cannot now be heard to say that that was wrong, first, because it was done by consent; and, secondly, because the decree stands unreversed, and therefore would be binding on him, even if he had not consented. The estate has, therefore, been properly converted into money, and as between volunteers — which both administrators and remaindermen are — it has been laid down that they must take the estate as they find it.

In *Ozenden* v. *Lord Compton*, 2 Ves. 69, 70, Lord Loughborough says, speaking of the real and personal representatives: "Both are volunteers. Each must take what they find at the death of the person entitled for life, in the condition in which they find it. The legal right is not questioned: then upon what equity must I make this transmutation for the benefit of a person equally a volunteer?" That is the question I have asked here, and it has been suggested that the court was wrong. It is said that the court had power to sell for the purpose of raising costs, but for no other purpose. But if the court had no power to sell generally, how could it sell for costs? An infant has no costs: the costs incurred on his behalf in a suit are the costs of his

guardian or next friend; and even if they were his own, I know of no principle by virtue of which the debt of an infant can, apart from a judgment, be charged on his real estate. If, then, the suggestion be that the conversion is altogether wrongful, I am asked to reverse a decree of the court, which I cannot do.

But then it was said that the decree of the court was partially wrong. Now, as to that, the case of *Flanagan* v. *Flanagan* appears to me unanswerable: — [His Honor read the statement of this case contained in the judgment in *Fletcher* v. *Ashburner*, 1 B. C. C. 500.] I am aware that the decision of Vice-Chancellor Shadwell in *Jermy* v. *Preston*, 13 Sim. 356, and the decision of Lord Romilly in *Cooke* v. *Dealey*, 22 Beav. 196, appear at first sight to be antagonistic to this. In *Jermy* v. *Preston* the report does not state the trusts of the term the estate subject to which had been sold: but counsel on both sides appear to have said that the court had sold more than was necessary. How that could be is difficult to understand, for it appears from the report that the decree ordered a sale or mortgage, with the master's approbation, of a sufficient part of the estates comprised in the term, and that the master made a report approving of the sale, by which he must have found that a sufficient part was sold. Again, the judgment in *Cooke* v. *Dealey* is based on a general principle assumed to have been laid down in *Ackroyd* v. *Smithson*, 1 B. C. C. 503, viz., that the conversion of real estate into personalty only takes effect to the extent of the object required, and that beyond this the rights of the parties remain the same as if no conversion had taken place. But all that *Ackroyd* v. *Smithson* decided was, that a conversion directed by a testator is a conversion only for the purposes of the will, and that all that is not wanted for these purposes must go to the person who would have been entitled but for the will. It does not decide that if the court or a trustee sell more than is necessary there is any equity to reconvert the surplus for the benefit of the heir-at-law of the person entitled at the time of the sale. As I have already remarked, it is not necessary to decide that question now: but it seems to me that if a conversion is rightfully made, whether by the court or a trustee, all the consequences of a conversion must follow: and that there is no equity in favor of the heir or any one else to take the property in any other form than that in which it is found: and that the sole question to be considered in all these cases is, whether the estate has been rightfully or wrongfully sold.

There will be a declaration that the fund is payable to the legal personal representative of the infant; but the petitioner will have his costs out of the fund.

MEEK *v.* DEVENISH.

Chancery Division. 1877.

[*Reported* 6 *Ch. D.* 566.]

George Meek made his will, dated the 29th of May, 1851, and thereby, after giving various legacies, gave, devised, bequeathed, and appointed all the rest, residue, and remainder of his real and personal estate and effects to which he might be entitled, or which he might have power to appoint at the time of his decease, to his wife and his son George Meek the younger, and Charles Henry Weston, their heirs, executors, administrators, and assigns, according to the natures and quality thereof respectively, upon trust to sell and dispose of the same, with power nevertheless for his trustees for the time being in their discretion, and for such time as might seem expedient, to defer the sale and conversion of all and any part of his residuary, real, and personal estate, and so long as his real estate, or any part thereof, should remain unsold, to keep the same in tenantable repair. And the testator declared that his trustees for the time being should stand possessed of the money arising from his said residuary, real, and personal estate upon trust, in the first place, to pay thereout all his funeral and testamentary expenses and debts, and upon further trust to invest the residue of the said money in manner therein mentioned, and to hold the same and the income thereof upon trust during the widowhood of his wife, out of the income to pay to his wife or her assigns, for her and their own benefit, the yearly sum of £750, and subject as aforesaid upon trust to pay the residue of the income which should accrue during the widowhood of his wife unto his son George Meek the younger, unless and until he should do any act whereby or in consequence whereof all or any part of the income, if made payable to him absolutely, would become vested in, or disposable by, any other person or persons, or unless and until any legal or equitable proceedings should be taken or enforced against him or his property by reason whereof all or any part of the same income, if payable to him absolutely, might be applied for the purpose of satisfying any debt or debts then due, or thereafter to become due, from him; and in case the estate thereinbefore limited to his son George Meek the younger should determine during the widowhood of his said wife, then upon trust to pay the residue of the income thenceforth to accrue during such widowhood unto his said wife, and after her death or second marriage, which should first happen, upon trust as to one equal moiety of the trust premises, and the income thenceforth to accrue in respect thereof for his son George Meek the younger, his executors, administrators, and assigns absolutely, and as to the other equal moiety of the said trust premises, and the income thenceforth to accrue in respect thereof, in case the estate thereinbefore

limited to his son George Meek the younger should not have determined during the widowhood of his wife under the proviso thereinbefore in that behalf contained, and his son should not have done any act whereby the second moiety should be vested in any other persons, then upon trust for the absolute benefit of his son George Meek the younger, his heirs, executors, and administrators. And after declaring that his son George Meek should not be deprived of the benefit of any of the trusts thereinbefore contained in his favor by reason of his executing any deed or deeds of settlement in contemplation of any marriage he might contract, the said George Meek the elder declared that in case of any event whereby the trust lastly above stated should become inoperative, that the said second moiety and the income thereof should be held by the trustees or trustee for the time being of his will, from and after the decease or second marriage of his said wife, upon certain trusts in favor of George Meek the younger and his wife and children, which in the events that had happened had failed, and were incapable of coming into operation.

By a settlement dated in September, 1858, made upon the marriage of George Meek the younger, to which George Meek the elder was a party, George Meek the elder covenanted that his executors or administrators should within six months after the death of himself and Amelia Meek, his wife, pay to the trustees of the settlement the sum of £20,000, and that he the said George Meek the elder, his executors or administrators, would in the mean time, and until the £20,000 should be paid, pay to the trustees an annual sum of £1000, as and for interest on such sum of £20,000. Provided always, that in case he or his wife should pay the said sum of £20,000 during their lives then the annual payment of £1000 should cease, and it was declared that the £20,000 should be held by the trustees upon the trusts of the settlement.

George Meek the elder died on the 8th of December, 1859, and his will was proved by his son, who took possession of his real and personal estate, and thereout paid his debts and funeral expenses, except the £20,000 covenanted to be paid to the trustees of the settlement.

After the death of George Meek the elder, the freehold estates remained unsold, and Amelia Meek resided with George Meek the younger at Brantridge Park, which was part of the real estate, during his life. George Meek the younger was never declared bankrupt and never did or suffered anything whereby any of the interest to which he was entitled under the said will or settlement determined.

George Meek the younger, during his life, retained the annual sum of £1000 covenanted to be paid to the trustees of his settlement, and no part of the £20,000 had yet been paid.

George Meek the younger made his will on the 7th of December, 1874, and thereby after giving various directions as to his furniture, books, and other chattels, declared that it should be lawful for his wife during her widowhood to occupy his dwelling-house at Brantridge Park and the lands appertaining thereto, and subject thereto, he gave,

devised, and appointed all his freehold and copyhold messuages, lands, tenements, and hereditaments in Sussex, being the estates devised by his father's will, to certain uses in favor of his sons and their issue (which in the events that had happened had failed), and in case of the failure of such estates, to the use of his daughter the plaintiff, Constance Amelia Meek, for life, and after her death to the use of the first and every other son of his daughter in tail, with remainder to her first and other daughters in tail, with remainder to his daughter the defendant, Mary Florence Meek, for life, and afterwards to her sons and daughters in tail, with remainder to certain uses in favor of his other daughters and their issue, and in case of the failure of such estates the testator directed that his said freehold Sussex estates should sink into and form part of his residuary estate. And the testator bequeathed all his personal estate to his trustees to sell and convert into money, and stand possessed thereof in trust for all his children upon attaining twenty-one in manner therein mentioned.

George Meek the younger died on the 8th of December, 1874, and his legal personal representatives became also the legal personal representatives of George Meek the elder. George Meek the younger left his wife Fanny Amelia Meek, and Amelia Meek, his mother, and the plaintiff and the defendant, Mary Florence Meek, who were infants, his only children him surviving. Fanny Amelia Meek died on the 13th of December, 1874, and Amelia Meek died on the 15th of December, 1874. George Meek the younger was at his death possessed of real and personal estate of considerable value in addition to the Sussex estate specifically devised by his will.

The bill was filed for the administration of the real and personal estate of George Meek the younger, and for the administration of the real and personal estate of George Meek the elder, and for carrying out the trusts of both wills under the direction of the court.

Glasse, Q. C., and *Levett*, for the plaintiff.

Bristowe, Q. C., and *Giffard*, for the second daughter of George Meek the younger.

J. Pearson, Q. C., and *Northmore Lawrence*, for the trustees and executors of the will.

Higgins, Q. C., and *E. Ford*, for the trustees of the marriage settlement.

MALINS, V. C., after stating the effect of the will to be to give George Meek the younger, after his mother's death, one moiety of the estate absolutely, and to give him the other moiety in the event (which happened) of his not doing any act during the widowhood to divest the income, or any act to divest the second moiety, continued: —

Now comes the question whether he was entitled to the whole produce of this estate? In my opinion there can be nothing more clear than that a person who is absolutely entitled to the produce of real estate has a right to say, "I will not have it sold, I desire to keep it in specie," and if the trustees resist that demand he can, as a matter of

course, get an injunction to prevent their selling, provided the necessary provision is made for charges, and it is equally clear that if the person giving that notice is not absolutely entitled, but that other persons are interested with him, that is, if the property is divided between two persons and one of them gives notice that he will retain it in specie, that is an absolute nullity against his companion, because he cannot do anything to prejudice another person, and the trustees would be bound to sell. If a man gives his property to be sold, and divides the proceeds into one hundred shares, and gives ninety-nine of those shares to A. and one share to B., A. cannot, without B.'s concurrence, retain the property in specie, and B. would have a right to say, "I will have it sold;" and, therefore, unless you get the concurrence of all parties no election can take place.

The other point which I have to decide here (and it is one upon which I have had not the slightest doubt from the moment the case was opened) is, whether a person who is entitled absolutely in a contingent event may not, before the happening of the contingent event, bind the trustees and say to them, "If the contingent event happens before my death I will elect to have this property kept in specie." I have no doubt whatever that if the property is given to trustees upon trust to sell and pay the produce to A. if one event happens, and to B. if another event happens, and B. says, "If I become entitled to this property I will not have it sold," and that event happens in his favor, he has an equal right to say to the trustees, "I will not have the property sold." It is not necessary that he should be absolutely entitled to the whole property when he gives the notice, but when he becomes entitled the previous notice is operative. In this case the testator, George Meek the younger, was absolutely entitled unless an event should happen which never did happen, and therefore if he had given formal notice to the trustees they would have been bound to obey that notice when it was ascertained, as it was on his death, that in the event that happened he became absolutely entitled to the property.

Now is there anything to be found in the books contrary to that? I should be astonished if there were. The only case relied upon is the case of *Sisson* v. *Giles*, 3 D. J. & S. 614, which is a decision of Lord Westbury's. The decision is this — two persons were absolutely entitled to the produce of real estate; they were required to execute a deed-poll requiring the estate not to be sold. Nothing could be more clear than that that would stop the sale, but it turned out that one of them was a married woman, and the deed, therefore, went for nothing. That case is no authority in favor of the arguments I have heard from Mr. Bristowe and Mr. Giffard.

Then is there any principle on which a man who is entitled to an estate in a contingent event, which may happen in his favor, may not give notice that if that event does happen he will have the land itself instead of the money? A man may have a favorite estate, as I have pointed out, given to him in a contingent event, and would not have it

converted into money at any price whatever. Suppose a boy to be entitled to the estate, and if he dies under the age of twenty-one some one else becomes entitled, and he says to the trustees, "Mind, if I become entitled to the estate I will keep it in specie," it would be a monstrous thing to say that, notwithstanding he gave that notice, he has no right to retain the estate in specie. That would be contrary to all principle. I believe the law to be thoroughly settled that, when a man is entitled to property in a contingent event, he may devise it, he may dispose of it, he may make it the subject of mortgage, or sell it, or make it the subject of election, or anything else. All he must do is to take care that nothing is done to interfere with the interests of third parties; and if notice is given while his interest is contingent, it is just as binding when the contingency happens as if it was given afterwards. If there were anything wanting to confirm me in this opinion, it would be the view taken by the Court of Appeal in the case which Mr. Glasse cited to me of *Mutlow* v. *Bigg*, 1 Ch. D. 385.

My view on this point being perfectly clear and without a shadow of doubt, the only question that remains is, Was there enough done by the testator to make an election? He survived his father for fifteen years. He and his mother and wife and family always lived in this place, and every act that he did showed his intention to keep it in specie. That I admit would not be enough. If he had simply died intestate, notwithstanding these circumstances, I think it would have gone as part of his personal estate. But he makes his will, and by limitations of the most cautious nature, deals with this property, giving his land, giving the mansion-house, giving the whole estate in specie, and limiting it to the elder daughter for life, with remainder to her first and other sons successively in tail, and failing her issue, with remainder over. Therefore he has shown the clearest intention that this property shall not be converted, and that being the family residence, it shall be retained as such, and be the residence of the head of the family. I am as clear upon this point as I was upon the other, that he not only had the right to elect, but that he has done enough to make the election, and that this property must be treated therefore as part of his real estate; the consequence of which is that the infant plaintiff is entitled to the estate for life, with contingent remainders to her issue and remainders over to her sister Mary Florence Meek, and in the same manner remainders to her issue.

The declaration will therefore be that George Meek the younger had power to elect to take as real estate the estate devised by the will of George Meek the elder, and that he did elect by his acts in his lifetime to do so, and that the estate is to be treated as his real estate.

CURTEIS *v.* WORMALD.

CHANCERY DIVISION AND COURT OF APPEAL. 1878.

[*Reported* 10 *Ch. Div.* 172.]

THE testator, George Gent, died in 1818, having by his will devised his real estates in settlement, limiting life estates to several persons, with remainders to their sons successively in tail male, and the ultimate reversion in fee to a relation who died in the testator's lifetime. By a codicil he, on the death of the devisee of the reversion, substituted another devisee; but by a seventh codicil revoked this substituted devise, and by an eleventh codicil directed that "the remainder of the fee simple of all my landed estates shall go in such way as the law may direct." He directed his trustees, whom he also appointed his executors, to lay out his residuary personal estate in the purchase of freehold and copyhold estates to be settled to the same uses.

All the tenants for life survived the testator and died without issue, and on the death of the survivor of them in 1870, all the dispositions of the real estate came to an end.

The next of kin of the testator at his death were Edward Walker and Benjamin Walker. Edward Walker died in 1820, and Benjamin Walker in 1827. The testator's debts and funeral expenses and legacies were all paid, and at various times, beginning in 1821 and ending in 1870, considerable sums forming part of the testator's residuary estate were invested in the purchase of freehold and copyhold estates. The freeholds so purchased were for the most part, if not entirely, conveyed to the uses declared by the will and codicils concerning the devised estates. The copyholds were surrendered to the trustees on corresponding trusts. The last of these purchases was completed after the death of the last tenant for life, but the contract had been entered into before his death.

Edward Walker devised his real estates to his son George Walker absolutely. Benjamin Walker died intestate as to his residuary real estate, leaving George Walker his heir-at-law. George Walker devised all his real estate to the plaintiff E. Walker and the defendant Robert Walker upon trusts. The plaintiff E. Walker and the defendant Robert Walker were thus the real representatives both of Edward Walker and of Benjamin Walker, and they were also the personal representatives of Edward Walker. The personal representative of Benjamin Walker was Jeremiah Curteis, the other plaintiff. The plaintiff E. Walker was the heir-at-law of both Edward Walker and Benjamin Walker.

By an order made on the 13th of November, 1876, it was declared that, according to the true construction of the will and codicils of the testator, and in the events which had happened, he had died intestate as to the corpus of his residuary personal estate, and that his next of

kin, according to the Statutes of Distribution, living at his death, were entitled to such corpus.

A summons was now taken out by the plaintiff E. Walker, asking for a declaration that the corpus of the residuary personal estate, to which the next of kin were declared by the order of the 13th of November, 1876, to be entitled, devolved as real estate. The summons was heard before the *Master of the Rolls* on the 3d of March, 1878.

Davey, Q. C., and *Romer*, for the plaintiff E. Walker.

Chitty, Q. C., and *Murray*, for the legal personal representatives of Benjamin Walker.

Bayshawe, Q. C., and *Snape*, for the defendant Robert Walker.

Jessel, M. R. The point which I have to consider and to decide is this: A testator directed his trustees — for although the same persons may have been appointed executors they are for this purpose trustees, and trustees only — to lay out his residuary personal estate in the purchase of real estate, freeholds and copyholds, to be settled to certain uses, comprising a long series of limitations. The residue was ascertained, that is, the testator's debts and legacies and funeral and testamentary expenses were all paid, and then the residue was at different times laid out by the trustees, pursuant to the will, in the purchase of freehold and copyhold estates, which were conveyed so as to vest the legal estate in the trustees.

That being so, the limitations took effect to a certain extent, and then, by reason of failure of issue of the tenants for life, the ultimate limitations failed, and there became a trust for somebody. Now, for whom ?

According to the doctrine of the Court of Equity, settled, if I may say so, by the well-known case of *Ackroyd* v. *Smithson*, 1 Bro. C. C. 503 — for it has always been the law of this court since — this kind of conversion is a conversion for the purposes of the will, and does not affect the rights of the persons who take by law independent of the will. If, therefore, there is a trust to sell real estate for the purposes of the will, and the trust takes effect, and there is an ultimate beneficial interest undisposed of, that undisposed of interest goes to the heir. If, on the other hand, it is a conversion of personal estate into real estate, and there is an ultimate limitation which fails of taking effect, the interest which fails results for the benefit of the persons entitled to the personal estate, that is, the persons who take under the Statutes of Distribution as next of kin. Their right to the residue of the personal estate is a statutory right independent of the will.

The result is that in the case I put there is a trust for the next of kin. How any one could imagine it was a trust for anybody else it is difficult to understand; and had I not been referred to the judgment of a very eminent judge on this subject I should have said it was impossible to understand it.

There certainly is authority for saying — a single authority, and an authority standing alone — that the ultimate trust is not for the next

of kin, but for the executors. Why? The executors have ceased to have anything whatever to do with the matter. They have paid over the legacy to the legatee, who happens to be a legatee-trustee, and who holds it by law, under the Statutes of Distribution, as trustee for the next of kin, and no one else. By what process of reasoning any other result can be arrived at I have been unable to discover. The decision to which I have referred is one which, to my mind, is utterly opposed to the whole law upon the subject.

Then the next question which arises is, how does the heir-at-law in the first case, or the next of kin in the second, take the undisposed of interest? The answer is, he takes it as he finds it. If the heir-at-law becomes entitled to it in the shape of personal estate, and dies, there is no equitable reconversion as between his real and personal representative, and consequently his executor takes it as part of his personal estate.

On the other hand, if the next of kin, having become entitled to a freehold estate, dies, there is no equity to change the freehold estate into anything else on his death: it will go to the devisee of real estate, or to his heir-at-law if he has not devised it, and will pass as real estate. As to that, there is no question, no doubt, no difficulty. No one has suggested any other principle, and even in the case cited — *Reynolds* v. *Godlee*, Joh. 536, 582 — it was admitted that that was the principle, and the only point of difference or distinction suggested was that which appears to me to be opposed to the whole law on this subject, namely, that there was an ultimate trust for the executors, and not for the next of kin.

As that does not seem to me to have any foundation, and as it appears to me to be opposed to both principle and authority, I do not consider myself bound to follow that decision, and I may say that I am very glad to find I can invoke the very same judgment of the very same judge for the purpose of showing that I am not bound to follow it; for, being referred to a decision of another judge — the Master of the Rolls — given several years before, he said that that decision was not obligatory upon him; but that as he thought it consonant with sense and reason, and sound law, he chose to follow it. Unfortunately I do not entertain the same view as regards this authority, and therefore I am unable to follow it.

A declaration was accordingly made "that all the real estate bought or contracted to be bought before the death of the last tenant for life passed to Edward Walker and Benjamin Walker, the next of kin of the said testator, as real estate in equal moieties, and that George Walker became entitled to one of such moieties as the devisee of the said Edward Walker, and to the other moiety as the heir-at-law of the said Benjamin Walker at his (Benjamin Walker's) death, and that both of such moieties passed to the devisees of the real estates under the will of the said George Walker."

The legal personal representative of Benjamin Walker appealed. The appeal was heard on the 20th of December.

Chitty, Q. C., *Ince*, Q. C., and *G. Murray*, for the appellant.

Davey, Q. C., and *Romer*, for the plaintiff Edward Walker, and *Bagshawe*, Q. C., and *Snape*, for the defendant Robert Walker, were not called upon.

JAMES, L. J. I have no doubt as to the proper decision to be arrived at in this case. With all deference to the judgment of Lord Hatherley, it is impossible, I think, to arrive at any other conclusion than that at which the Master of the Rolls has arrived. It was settled by *Cogan* v. *Stephens*, 5 L. J. (Ch.) 17, that what was the right rule as between the real and personal estate where land was directed to be sold, was also the right rule as between the two estates in the case where money was directed to be laid out in the purchase of land, that is to say, if the purpose for which that land was required failed, the undisposed of interest went back to the persons entitled to the personal estate. It has been urged that this means that it goes back to the executors to be dealt with as personal estate. But where there is no trust remaining to be performed, and the executors have entirely discharged themselves from every executorial duty, it is absurd to say that the undisposed of interest in the personal estate is to go back to them upon trust for the persons entitled to the personal estate; it goes directly to the persons beneficially entitled, that is to say, to the next of kin, just as the undisposed of proceeds of the sale of real estate go to the heir-at-law. And therefore the same principle applies in both cases, which is this, that where you trace property into a man there is no equity between his different classes of representatives as to altering the position in which that property is. If it is money arising from the sale of land it remains money, that is to say, the heir-at-law of the person who has become beneficially entitled to it as heir-at-law has no right to have it reconverted into land. If it is land purchased under a direction to invest in land, the persons interested in the personal estate of the persons who have become entitled to it as next of kin have no right to have it reconverted into money. This property came to the next of kin in the shape of real estate, and their personal representatives have no equity to have it converted, but it must go to the heirs or devisees of the next of kin according as they died intestate or testate. The decision of the Master of the Rolls must be affirmed.

BAGGALLAY, L. L. I entirely assent, and for the same reasons.

THESIGER, L. J. I am of the same opinion.

CHAPTER II.

ELECTION.

NOYS *v.* MORDAUNT.

CHANCERY. 1707.

[*Reported* 2 *Vern.* 581.]

JOHN EVERARD having *two* daughters, in 1686, makes his will, and devises to Margaret, his eldest daughter, his lands in Beeston, and *eight hundred pounds* in money: to Mary his *second* daughter, his lands in Stanborn and Broom, and *one thousand three hundred pounds* in money; provided and on condition she released, conveyed and assured Beeston lands to her sister Margaret; and devised to his said *second* daughter *one thousand three hundred pounds* in money. Provided if he should have a son, what was devised to his daughters to be void; and in such case gave to Margaret *one thousand two hundred pounds*, and to Mary *one thousand pounds*. Provided if he should have another daughter, then he gave the *eight hundred pounds* devised to Margaret, to such after-born daughter, and the lands at Stanborn and Broom and the *one thousand three hundred pounds* devised to Mary the *second* daughter to the said Mary, and such after-born daughter equally between them. He shortly afterwards died, and left his wife *ensient* of a daughter Elizabeth; Mary married Higgs, and died without issue, not having given any release to Margaret her sister according to the will.

Elizabeth claimed not only the lands devised to her by the will, and a moiety of what was devised to her sister Mary; but also a moiety of the Beeston lands devised to Margaret; the same on the testator's marriage, being settled on himself for life, and his wife for her jointure, and to the first and other sons, and in default of issue male, to the heirs of his body.

Question was, whether she should be at liberty so to do, or ought not to acquiesce in the will; or renounce any benefit thereby.

LORD KEEPER [COWPER]. In all cases of this kind, where a man is disposing of his estate amongst his children, and gives to one fee simple lands, and to another lands entailed, or under settlement; it is upon an implied condition, that each party acquit and release the other;

especially as in this case, where plainly he had the distribution of his whole estate under his consideration, and has given much more to Elizabeth, than what belonged to her by the settlement; and had it in his power to cut off the entail.[1]

ANONYMOUS.

CHANCERY. 1709.

[*Reported Gilb. Eq.* 15.]

THE case was this. A. was seised of two acres, one in fee, t' other in tail; and having two sons, he by his will, devises the fee-simple acre to his eldest son, who was issue in tail; and he devised the tail acre to the youngest son and died: The eldest son entered upon the tail acre; whereupon the youngest son brought his bill in this court against his brother, that he might enjoy the tail acre devised to him, or else have an equivalent out of the fee acre; because his father plainly designed him something.

LORD CHANCELLOR [COWPER]. This devise being designed as a provision for the younger son, the devise of the fee acre to the eldest son, must be understood to be with a *tacit* condition, that he shall suffer the younger son to enjoy quietly, or else, that the youngest son shall have an equivalent out of the fee acre, and decreed the same accordingly.[2]

HEARLE *v.* GREENBANK.

CHANCERY. 1749.

[*Reported* 1 *Ves. Sr.* 298.]

THIS cause came before the court on two bills: the original by the plaintiffs as devisees and residuary legatees of Mary Winsmore, wife of William Winsmore, a bankrupt, to have an appointment made by her of a real estate, devised to her by her father Doctor Worth, established; and that the executors might account with the plaintiffs for all the real and personal estate of Doctor Worth, after raising £8000 and other legacies, bequeathed by the will of Mary Winsmore: and that Mary Winsmore the infant might convey the freehold, copyhold, and leasehold estate to them.

The cross bill was brought by the assignees, under the commission of

[1] The rest of the case, relating to another point, is omitted.
See *Streatfield* v. *Streatfield*, Cas. temp. Talb. 176 (1736).

[2] And see *Schrader* v. *Schrader*, Kay, 578 (1854); affirmed on appeal, 18 Jur. 987.

bankruptcy against William Winsmore, that they, as standing in his place, might have the benefit of everything which Mary Winsmore was entitled to, as belonging to her husband, and to have an account of the freehold, copyhold, and leasehold estate of Doctor Worth, and of the real and personal estate of Dorothy Price; and that if the legal interest of the leasehold estate remained in any of the parties, they should convey it to the assignees.

Doctor Worth had an only daughter about sixteen or seventeen years of age. William Winsmore in December, 1739, married her clandestinely, without the consent of her father, who was offended with her; but, as she was young, was more offended with the husband, who made her believe he was a man of fortune; and in like manner imposed on her father, and got from him about £1400 which Mary was entitled to from her aunt Dorothy Price. Within three months after the marriage, a commission of bankruptcy issued against the husband; and in June, 1741, Mary the infant was born.

August, 1742, Doctor Worth made his will, and died; thereby giving some legacies and charities, he devised all his freehold, copyhold, and real estate whatsoever, and wheresoever, and all his leasehold estate, to two trustees, their heirs, executors, administrators, and assigns in trust, to apply the residue, after paying their own charges, to the sole and proper use of his daughter Mary Winsmore during her life, and to be at her disposal, and not subject to the debts or control of her husband; her receipts to be good; and to permit her by deed or writing, executed in presence of three or more witnesses, notwithstanding her coverture, to give and dispose of all his freehold, copyhold, and leasehold estate, as she shall think fit; she having a particular regard to his poor relations in Cornwall; and gave to the same trustees, whom he made joint executors, his personal estate in trust for the sole and separate use of Mary Winsmore, and to be at her disposal, and not subject to the debts or control of her husband.

October, 1742, Mary Winsmore then under the age of 21, though above 17, after the husband's bankruptcy, and living separate from him, made her will; [see 3 Atk. 697] and thereby in pursuance of her power in her father's will, gave to her daughter Mary £100 *per ann.* till she attain the age of ten, and after that £150 *per ann.* till twenty-one: *these sums to be applied for her maintenance and education, and gave her* £8000 *to be paid her when she attains twenty-one; but if she died before twenty-one without issue of her body living at her death, she gave the* £8000 *to two other persons*, viz. Hearle, one of the plaintiffs in the original cause, and Henry Worth, to be paid within ten months after the decease of her daughter: she then gave legacies to some poor relations; appointing the two trustees in her father's will, and two others joint executors, guardians, and trustees to her daughter: then devised the residue of her real and personal estate to the plaintiffs, the two Hearles, their heirs, executors, and administrators forever, as tenants in common, not as joint-tenants, charged as aforesaid.

Mary Winsmore had four kinds of estates; first, a leasehold, originally of ninety years under a church lease, to which she was clearly entitled under her father's marriage-settlement; but the term expired; and when it was to be renewed by the Dean and Chapter of Worcester, it was made a lease for three lives: next a personal estate, coming to her from her aunt Price; and some copyholds which were admitted to be considered by the custom of the manor as chattel interests: thirdly, the personal estate of her father: fourthly, his real estate.

Lord Chancellor [Hardwicke] took time to consider of the case, and now delivered his opinion.

As to the first kind of estate which Mary Winsmore had, being a freehold lease, her husband might be entitled thereto during her life; but upon her death it came to her daughter as special occupant: so that the husband is not entitled to be tenant by *curtesy* of it; and the assignees cannot claim it: nor can the power on Doctor Worth's will affect it, being taken as a purchase. So that is to be laid out of the case, as neither the plaintiffs in the original or cross cause can claim it.

As to the personal estate of her father: it is given to her separate use; in which case it is a rule of the court, that a *feme covert* may dispose of it: and this is clear of the objection made as to the real estate; because she was above the age of seventeen, at which age, if sole, she might make a will. Nay the books say, if above fourteen, the will is therefore a good appointment of the personal.

But as to the real estate, the principal question is, whether her will is a good execution of the power in her father's will? And upon this there are three questions. First, whether the power is well executed? Secondly, whether the plaintiffs who claim the real estate subject to the legacies, are not entitled to put the infant to her election: and if she will take the £8000, whether she will be admitted in equity to contradict and defeat her mother's will as to the real estate? Thirdly, whether the bankrupt is entitled to be tenant by *curtesy?*

[The Chancellor considered the first question at length, and determined that the power to appoint real estate could not be exercised by the infant.]

As to the equity of the plaintiffs from the claim of the £8000 legacy: it is true it was determined in *Noys* v. *Mordaunt*, 2 Ver. 581, that if lands in fee are given to one child, and to another lands entailed, it is meant, they should release to each other: and the court has gone farther since, to the case of a personal legacy. But still I am of opinion, this differs from all those cases: and the infant is not obliged to make her election; for here the will is void. And when the obligation arises from the insufficiency of the execution or invalidity of the will, there is no case, where the legatee is obliged to make an election; for here is no will of the land. A man devises a legacy out of land to his heir-at-law; and the land to another: the will is not well executed according to the Statute of Frauds for the real estate: the court would not oblige the heir-at-law, upon accepting the legacy, to give up the

land. This differs from *Noys* v. *Mordaunt* in the reason of the thing; there the testator devised some lands, which were, and others which were not his own: and the court said, that the devisee should suffer the lands to pass, as if they were his own: but here, whether the lands were her own or not, they cannot pass by the will. Another distinction is, Lord Keeper there grounded his opinion upon the father's disposing his estate among his children; whereas here she had but one child, and disposes of her whole real estate charged with legacies to the plaintiffs.

As to the claim by the assignees of the rents and profits during the bankrupt's life, I am of opinion, he is not entitled to be tenant by *curtesy*, upon the ground of the husband's having no seisin in law or equity. By the father's will the whole legal inheritance was vested in the trustees, and though said to be determined in *Cusburn* v. *English*, that husband may be tenant by *curtesy* of a trust in equity; yet first the wife must have the inheritance: secondly, there must be a seisin of the freehold during the coverture. That the wife had the inheritance is true, and there was a kind of seisin; that is an equity; a trust of the profits for her life: but here the father, whose estate it was, has made his daughter a *feme sole*, giving her the profits during her life; but not subject to the control of her husband. Then what seisin had the husband in equity during the coverture? and this is essential to a tenancy by *curtesy*, and would be directly contrary to the intent of the testator.

But as to the interest of the £8000, I am of opinion, the infant daughter is not entitled thereto till twenty-one. The general rule is, that a legacy payable at a certain time does not carry interest till the time of payment comes; for interest is given for delay of payment. If interest is given in mean time, the representative of the legatee shall recover the legacy immediately; but if not, the representatives shall not recover it, till the time when by computation the infant might have attained his age. The ground I go upon is, that in the cases, where the court has given interest in the mean time, it has been, where interest has been intended by way of maintenance. Here the testatrix has made another provision for the legatee's maintenance, and not to arise out of the interest; for then the argument would be stronger, that the legacy was intended to carry interest in the mean time: but it is given out of the general fund. Another thing is the contingency; which shows it was in her view that she might die before twenty-one. There are indeed several cases, where the court has given interest; as in *Acherly* v. *Vernon*; but there were particular reasons for it.

Next as to the aunt's personal estate a question has been started, whether, if the assignees are entitled thereto (the husband gaining a matrimonial right, which survives to him, and cannot be affected by the power or appointment), they can claim it in equity, without being obliged to make a provision for the daughter? In *Jewson* v. *Moulson*, Mich. 16, G. 2 [2 Atk. 417], I was of opinion, that the assignees have been compellable to make a settlement for a wife, where the husband

had made none. But I can find no case, where it has been done for a child: I do not say it cannot, but there are reasons here why it should not. It is a liberal discretion, which the court exercises in the case of a wife; and in this case the child is provided for, so that the court ought not to make this the first instance; for she is entitled to the real estate, and to £8000 out of the personal; which is a great provision; and the court will not make a stretch in equity in the case of a child thus provided for; and on the other hand fair creditors. But the £1400 paid by the doctor to the bankrupt, must be considered as paid out of the personal estate of the aunt.[1]

FRANK *v.* STANDISH.

Exchequer. In Equity. 1772.

[*Reported* 1 *Bro. C. C.* 588, *note.*]

A testatrix being seised of freehold estates, and some copyhold lands, lying dispersedly, and having surrendered those copyhold estates to the use of her will; by her will devised all her real estates, as well freehold as copyhold, and gave Lady Standish, who was one of her coheirs at law, £1000. Before the making of her will, she exchanged some of those copyhold lands for others: which were surrendered to her, but she did not surrender those to the use of her will. The cause had been heard a few days before, when the question was made,

[1] Cf. *Boughton* v. *Boughton*, 2 Ves. Sr. 12 (1750).

"I have looked at my own note of *Cary* v. *Askew*; and Mr. Romilly's account of it is very correct. Mr. Mansfield argued in support of the distinction between *Boughton* v. *Boughton* and *Hearle* v. *Greenbank*. I argued it on the other side; and mentioned most of the topics, that have been urged on that side in this case. Lord Kenyon said, the distinction was settled, and was not to be unsettled, that if a pecuniary legacy was bequeathed by an unattested will under an express condition to give up a real estate by that unattested will attempted to be disposed of, such condition being expressed in the body of the will, it was a case of election; as he could not take the legacy without complying with the express condition. But Lord Kenyon also took it to be settled, as Lord Hardwicke has adjudged, that, if there was nothing in the will but a mere devise of real estate, the will was not capable of being read as to that part; and unless according to an express condition the legacy was given so, that the testator said expressly, the legatee should not take, unless that condition was complied with, it was not a case of election. The reason of that distinction, if it was *res integra*, is questionable. It is more difficult to raise a case of election here; as in this case there is real estate, that would answer any description of estate or land, that would pass without three witnesses: viz. the estate in Bermuda. But it is not necessary to attend to that distinction: for after the doctrine has been so long settled, though with Lord Kenyon I think the distinction such as the mind cannot well fasten upon, it is better the law should be certain, than that every judge should speculate upon improvements in it." — *Per* Lord Eldon, C., in *Sheddon* v. *Goodrich*, 8 Ves. 481, 496 (1803).

whether Lady Standish should be put to her election; and the court this day gave judgment unanimously, that this case was within the reasoning of *Noys* v. *Mordaunt*, 2 Vern. 581, and Lady Standish having elected to take the £1000 legacy, decreed that she and the other co-heirs should surrender the copyhold to the uses of the will.[1]

STRATTON *v.* BEST.

CHANCERY. 1791.

[*Reported* 1 *Ves. Jr.* 285.]

JOHN LIGHT in 1764 suffered a recovery of the manor of B——; though in fact he was entitled only to a part of it. He afterwards made a will, devising in general terms all his real and personal estate to trustees, &c.

Mr. Mitford, for infants, made a question, whether as testator supposed himself entitled to the whole manor, which was proved by the evidence, that was not sufficient to put legatees to election.

LORD CHANCELLOR [THURLOW]. I think, testator did at the time of the recovery suffered consider himself as having a power to dispose of the whole estate; but can I construe it so, unless there is something in the will to show it? Suppose White-acre and Black-acre; and that testator has a disposing power over one, and not over the other; can the court admit evidence *dehors* the will to show testator's conceit about it? I admit you have proved, that in 1764, when the recovery was suffered, he took himself to be master of the whole. I have no doubt, but that, if he had been asked, when he made his will, whether he did not mean the whole, he would have said, Yes: and, if desired to put in a description of it, he would have done so: that I believe upon the evidence, you have brought. But to do this I must say, that evidence *dehors* the will of testator's opinion at any time may be produced; and I do not think that is the law of the court. All the argument in *Noys* v. *Mordaunt*, 2 Vern. 581, and the whole suite of cases upon this subject have turned upon the expressions of the will. If I was to receive evidence of the testator's fancy, it would introduce a very desperate rule of property in this court.

[1] Cf. *Brodie* v. *Barry*, 2 Ves. & B. 127 (1813).

WHISTLER *v.* WEBSTER.

CHANCERY. 1794.

[*Reported* 2 *Ves. Jr.* 367.]

BY indentures 13th August, 1784, John Whistler, out of the love and affection he bore Elizabeth his wife, and to make a suitable provision for her, in case she should survive, and for other considerations, assigned and transferred to Lady Martha Webster, her executors, &c. certain leasehold premises and moneys upon trust to raise £3000, and to invest that sum in government or real securities, and from time to time to pay the produce to John Whistler for life; after his decease, to his wife for life; and after her decease, to pay the principal, or transfer the securities, to and among all and every, or such of the children of the said John Whistler in such shares and proportions, and at such times, and subject to such conditions, as he should by his last will and testament appoint; for default of such appointment, to and among all and every, the children of John Whistler by Elizabeth, equally to be divided between them share and share alike, as tenants in common and not as joint-tenants.

The fund having been laid out as directed, John Whistler by his will gave to his son John £1000; to his son Hugh £4000; and reciting that he was bound for his son Webster Whistler, in £300, he gave him £100 more, if there should be sufficient effects after paying the other legacies before and after mentioned. He gave his daughter Mary Reeves £500; and his daughter Jane Whistler £1000; but directed, that she should be excluded from it, if she should attempt to marry without leave of her mother or guardians. The will then proceeded thus: "I also give to my granddaughter Elizabeth Reeves the sum of £1000 of lawful money of England, to be paid her after my wife's decease, out of a deed of trust. In case my said granddaughter die before my wife, I give and bequeath the said sum of £1000 after my wife's decease to my youngest daughter Jane Whistler. I also give and bequeath to the children of my eldest son John Whistler £900 of lawful money of England, to be equally divided among them after my wife's decease, out of the deed of trust aforesaid. I also give and bequeath to my grandson Emanuel Reeves £500 of lawful money of England, to be paid after my wife's decease, out of the deed aforesaid. I also give and bequeath to the rest of the children of my daughter Mary Reeves except Elizabeth, to whom I have already bequeathed £1000, £600 of lawful money of England, to be equally divided among them after my wife's decease, out of the aforesaid deed of trust. Also if my grandson Emanuel should happen to die before my wife, my will is that the £500 left him shall after my wife's decease be equally shared among all the children of my daughter Mary Reeves aforesaid except Elizabeth, for

whom I have already provided: those children to be brought up in the Church of England to be excluded all benefit of these legacies."

The testator then gave his wife all his goods and chattels; and all the overplus of his property and effects he gave equally to be divided between his son Hugh and his daughter Jane; and made Lady Webster and his wife executors and guardians.

The testator died in 1786 leaving all the children mentioned in his will surviving. They were the only children living at the execution of the indentures of 1784. John Whistler, jun., died before his mother; who died in 1793.

Jane Whistler married John Baxter; and they with Hugh and Webster Whistler, brought the bill charging, that the appointment was bad, and that the £3000 became upon the death of Elizabeth Whistler divisible between the surviving children and the representatives of John.

The appointment to the grandchildren being clearly bad, the only question was, Whether the children must elect to take under the settlement or the will.

Mr. Graham and *Mr. Cox*, for the plaintiffs.

Mr. Lloyd and *Mr. Campbell*, for the defendants.

Master of the Rolls. [Sir Richard Pepper Arden.] When this cause was opened, I had no doubt: but *Cull* v. *Showell*, Amb. 727, was mentioned. If I had any doubt, I should be glad to have the great authority of the Lord Chancellor to determine the doubtful opinion I might entertain: but in a case in which I have no doubt whatsoever, it is my duty to pronounce my opinion.

The question is very short; whether the doctrine laid down in *Noys* v. *Mordaunt* and *Streatfield* v. *Streatfield*, For. 176, has established this broad principle; that no man shall claim any benefit under a will without conforming, as far as he is able, and giving effect, to everything contained in it, whereby any disposition is made showing an intention, that such a thing shall take place; without reference to the circumstance, whether the testator had any knowledge of the extent of his power, or not. Nothing can be more dangerous than to speculate upon what he would have done, if he had known one thing or another. It is enough for me to say, he had such intention; and I will not speculate upon what he would have intended in different cases put. There is an error in *Cull* v. *Showell*, if it was determined upon the point, which seems according to both the books, from which it is cited, to have been argued, and acquiesced in by the court. It is endeavored to say, the parties do not take under the will: they did not in any one case. In *Streatfield* v. *Streatfield* there was a legal estate; the devisor thought he had given himself the complete interest to dispose of: but it turned out, that he was a mere trustee; that he had given himself no estate he could devise. It might be said there, as here, if he had known that, he would not have made that disposition. I am obliged to say *Cull* v. *Showell* is erroneous, if founded upon the argument first

argued: but there is another point in that case very material, namely, the length of time. It was impossible then to tell, of what the personal estate consisted; and no person can be put to elect without a clear knowledge of both funds. I rather imagine, the Lord Chancellor went with the counsel in both arguments: but I am willing to believe, the latter was the ground: and that is sufficient to bear him out. The argument of Mr. Wooddeson is very ingenious, as far as he endeavors to distinguish that case from *Streatfield* v. *Streatfield* and the other cases of election. The circumstance of the legal estate and the other cases, he puts, of tenant in tail neglecting to suffer a recovery, and of copyhold devised without surrender, make no difference. The devisor had the power if he had used the proper means. *Non constat*, that General Pulteney would have made that disposition, if he had known his situation. The distinction between *Hearle* v. *Greenbank* and these cases is, that where a testator affects to give real estate by will, it cannot be read, nor his will collected from it either in courts of law or equity, unless there are three witnesses; otherwise it does not speak as to his land: but if there is an express condition, that would do; as in *Boughton* v. *Boughton*, 2 Ves. Sen. 12. In *Hearle* v. *Greenbank* capacity both in the instrument and in the person giving was wanting. I have no difficulty in saying, I cannot distinguish this from *Streatfield* v. *Streatfield* and *Lord Darlington* v. *Pulteney* [3 Ves. Jr. 384]. If the instrument is such as to indicate what the intention was, the only question, I will ask, is, did he intend the property to go in such a manner? I will not ask, whether he had power to do so; and whether he would have done it, if he had known, he could not without a condition imposed upon another person. Whether he thought he had the right, or knowing the extent of his authority intended by an arbitrary exertion of power to exceed it, no person taking under the will shall disappoint it. If a testator disposes of the estate of A. to whom he gives some interest by his will, A. shall not take that, unless he gives up his estate to that amount.

There is no difficulty of arrangement. No one claiming a legacy under the will shall have any part of this fund to the disappointment of those, to whom it is given by the will. If they will have this fund, I will take away their legacies; which shall go in compensation, as far as they will.

Therefore let the children elect; and reserve further directions.

THELLUSSON *v.* WOODFORD.

CHANCERY. 1806.

[*Reported* 13 *Ves.* 209.]

THE will of Peter Thellusson, dated the 2d of April, 1796, devising all his estates, manors, &c. at Brodsworth, and other places in the county of York, and all the messuages or tenements, lands, hereditaments, or premises, for the purchase whereof he had entered into any contract or contracts in writing, with the benefit of such contract and contracts respectively, and all other his real estates, whatsoever and wheresoever, to the use of trustees, their heirs and assigns, upon the trusts after mentioned, contained the following clause: —

"In case I shall in my lifetime enter into any contracts for the purchase of any lands, tenements, or hereditaments, and I shall happen to die, before the necessary conveyances thereof are executed, I order and direct, that all and every such contract or contracts, so entered into by me as aforesaid, shall be completed and carried into execution by my said trustees after my death, and that the purchase-moneys for such respective estates and premises shall be paid by them by with and out of my personal estate and effects, and that the deeds and conveyances thereto respectively shall be made to them, their heirs and assigns; and that they and every of them shall stand, remain, and be, seised and possessed of all and singular the premises so to be conveyed upon under and subject to such and the same uses, trusts, limitations, provisoes, and conditions, as are in and by this my will created, expressed, and declared, of and concerning the estates hereby directed to be purchased by and with the aforesaid residuum of my estate and effects in the manner hereinbefore mentioned."

The testator within a month before his death, had contracted for the purchase of real estates to the amount of £30,000.

The bill, filed by the trustees, prayed, that the trusts of the will may be established; and that it may be declared, whether Peter Isaac Thellusson, as heir-at-law of the testator, is or is not entitled to such parts or particulars of his real estate, as were conveyed to him after making his will; and also to such particulars of his real estates as were purchased, contracted, or agreed to be purchased, by the testator after making his will; and to have such of the said contracts as remained unperformed at his decease completed for the benefit of his said heir-at-law, and to have the purchase money paid out of the personal estate of the testator; and particularly, that it may be declared, whether the heir is entitled to such last-mentioned real estates, and also to the legacies and bequests in the will; and, if not, then that he may be put to his election.

The decree, dismissing the bill, filed by the widow and children of the testator, as far as it sought to have the trusts of the will declared void, and establishing the will, giving directions for carrying the trusts into execution, and declaring a trust, as to the estates, contracted for by the testator after the date of his will, for the heir, reserving the question, whether he would be entitled to the personal bequests, having been affirmed by the House of Lords upon appeal the question of election was brought forward upon the petition of the trustees.

Mr. Martin and *Mr. A. Buller*, for the petition.

The Attorney-General [*Sir Arthur Piggott*], for the trustees and for the Crown.

Mr. Alexander, for the grandchildren.

The Solicitor-General [*Sir Samuel Romilly*], *Mr. Perceval*, and *Mr. Bell*, for the heir-at-law.

Dec. 16th. THE LORD CHANCELLOR [ERSKINE]. The prayer of the bill, filed by the heir-at-law, with reference to this point, is in effect, that the personal estate of the testator shall be applied to the completion of these contracts, directed by the will to be carried into execution, for the benefit of the heir; and that he in opposition to the will may take as heir those estates, so contracted for; and the trustees may stand seised, to his use, instead of the uses of the will. I give the judgment, which I find myself bound to give, with some reluctance; considering this will as dictated by feelings, not altogether consistent with convenience. But this appears to me to be a case of election. The jurisdiction, exercised by this court, compelling election, may be thus described. A person shall not claim an interest under an instrument without giving full effect to that instrument, as far as he can. If therefore a testator, intending to dispose of his property, and making all his arrangements under the impression, that he has the power to dispose of all, that is the subject of his will, mixes in his disposition property, that belongs to another person, or property, as to which another person has a right to defeat his disposition, giving to that person an interest by his will, that person shall not be permitted to defeat the disposition, where it is in his power, and yet take under the will. The reason is the implied condition, that he shall not take both; and the consequence follows, that there must be an election; for though the mistake of the testator cannot affect the property of another person, yet that person shall not take the testator's property unless in the manner intended by the testator.

This is the proposition. But it has been said, that when a testator by his will attempts to give that, which is not his property, but which he supposes to be his, forming his different dispositions upon that mistake, *non constat*, what he would have done, had he been aware of the true state of the circumstances. The best answer to that was given by Lord Alvanley in the case of *Whistler* v. *Webster*, that no man shall claim any benefit under a will without conforming, as far as he is able, and giving effect to everything contained in it, whereby any disposition

is made, showing an intention, that such a thing shall take place; without reference to the circumstance, whether the testator had any knowledge of the extent of his power, or not: nothing can be more dangerous than to speculate upon what he would have done, if he had known one thing or another: it is enough to say, he had such intention; and the court will not speculate upon what he would have done in the different cases put: if the instrument is such as to indicate, what the intention was, the only question is, did he intend the property to go in such a manner: not, whether he had power to do so, and would have done it, had he known, he could not without a condition imposed upon another person: whether he thought he had the right, or, knowing the extent of his authority, intended by an arbitrary execution of power to exceed it, no person, taking under the will, shall disappoint it.

In every case of election there must be an intention to dispose of that, over which that person has no power of disposition. That is the circumstance, that creates election. The testator, with this peculiar object, the application of his personal estate to the acquisition of great landed property, was not aware of the distinction between real and personal estate; and therefore conceived, that under this direction of his will as to his future contracts for purchases, his trustees would be legally seised according to the uses of his will. As he had not the power to make that disposition, the heir takes those estates, that cannot pass by the will: but the testator, not being aware of that, gives considerable interests to his heir; but gives those interests under the conception, that the whole property and arrangement were subject to his control; and upon that ground the principle of election must prevail.

In *Noys* v. *Mordaunt*, 2 Vern. 581, the testator imagined, he had power over the estate; which was in settlement: and the Lord Keeper put the decision upon the implied condition. That case was followed by *Streatfield* v. *Streatfield*, For. 176, and several cases down to *Sheddon* v. *Goodrich*, 8 Ves. 481. The difficulty upon a plain, simple principle first occurred in the case of *Hearle* v. *Greenbank*, 1 Ves. 298; 1 Atk. 695. But I do not apprehend, that this case will be embarrassed by that decision. Lord Hardwicke held, that the act of the infant had no effect; that there was no disposition as to the real estate; and therefore a case of election did not arise.

This is the case of a man, having a clear right to dispose by will both of his real and personal estate: but his disposition fails as to these real estates by his ignorance of the distinction, that a will of a subsequent date was necessary. There is therefore, as in the case of *Hearle* v. *Greenbank*, no will, that can touch these real estates. As to the case of a devise, with two witnesses only, the intention is as plain as in *Noys* v. *Mordaunt:* why then should not the court say in the former case, the intention is clear; but cannot as to the real estate have legal effect, from the omission of a third witness, by mistake; as

in the other case the devisor attempts through mistake to devise an estate, which is in settlement, or belongs to another person. The opinion of Lord Hardwicke I take to be this. A devise of real estate is considered as a matter of so much solemnity and importance, that the law will not accept proof of the act without the evidence of three witnesses. If not so proved, it is nothing: it cannot receive notice. The intention cannot be represented; for it cannot be presumed; and there is no evidence; the will, not being executed with the solemnity prescribed by the law as to real estate, cannot be read: the court cannot see any devise of real estate: and therefore, as the estate does not appear to be devised away from the heir, no act appearing to be done, as in this case the act does appear to be done by Mr. Thellusson, the heir cannot in that case be put to election. The case of *Hearle* v. *Greenbank* stands upon the same ground; an infant under the Statute not having a right to dispose of real estate. The court cannot look at the will. It is from the incapacity of the person, who frames it, considered as no instrument.

These are the only instances, in which the principle has been limited. It cannot be argued that it does not reach an heir-at-law. Lord Hardwicke would not put the case of an heir-at-law by way of illustration, if the heir could not under any circumstances be put to election. The principle of election is plain and intelligible, that, if a person, being about to dispose of his own property, includes in his disposition, either from mistake or not, property of another, an implication arises, that the benefit under that will shall be taken upon the terms of giving effect to the whole disposition. Mr. Thellusson's heir takes these estates, as if his father had not made a will: but my opinion is, that he cannot also take what is given to him by the will. He must therefore elect.[1]

JUDD *v.* PRATT.

Chancery. 1808.

[*Reported* 15 *Ves.* 390.]

This case came on upon an appeal from the decree, pronounced at the Rolls by *Lord Manners*, then Baron Sutton, and the Masters in Chancery, *Mr. Simeon* and *Mr. Cox;* dismissing the bill. The cause was again argued by *Mr. Fonblanque* and *Mr. Wooddeson*, for the plaintiffs; and *Mr. Richards* and *Mr. Wingfield*, for the defendant.

[1] The decree was affirmed in the House of Lords, "without any observations," *sub nom. Rendlesham* v. *Woodford*, 1 Dow. 249, 254 (1813).

See, accord., Churchman v. *Ireland*, 1 Russ. & M. 250 (1831); *Hance* v. *Truchitt*, 2 J. & H. 216 (1861).

The Lord Chancellor. [Lord Eldon.] The question, brought forward by this appeal, arises upon a residuary devise of real and personal estate: part of the estate consisting of copyholds, contiguous to, and intermixed with, freehold: whether the customary heir who takes a legacy of £500 can maintain a claim to the copyhold estates, as not surrendered to the use of the will: in other words, whether this is a case of election. It is settled, that a court of equity will apply the doctrine of election to copyhold estate, not surrendered to the use of the will. The true question therefore is, whether the testator is to be considered as having manifested an intention to devise the copyhold estate. The case of *Byas* v. *Byas*, 2 Ves. 164, is a strong authority upon the point; which case, as I find by my own note, was relied on by Lord Thurlow in *Lindopp* v. *Eborall*, 3 Bro. C. C. 18*l*; holding, that the general words in that will did not pass the copyhold estate; and, though the judgment, as it appears in the report of that case, is not very intelligible, it is sufficient to recall the meaning of Lord Thurlow to the minds of those, who heard him. His meaning was, that, where a testator intends to provide for his child, the court cannot determine, whether the provision shall be large or small, more or less: but can only say, that he does not intend a provision for that child. If therefore there is a freehold estate, that will answer the purpose of a provision, the court has no means of ascertaining, that he intended a larger provision: but where the court regards a testator as proposing, that his debts shall be paid, the amount of the debts must ascertain the value, to be applied to that purpose; and if the debts cannot be discharged by the freehold estate, the court draws the inference, that the testator meant to provide a fund, which would be sufficient to answer that, his purpose. In the one case, the parent intending to make a provision for his child, if that is done by the appropriation of a freehold estate, the extent of the provision being undefined, there is no reason for increasing it by the addition of the copyhold estate: in the other, the testator, meaning, that all his debts shall be paid, must be considered as intending to provide a fund, sufficient to answer that, his purpose and intention.

In the case of *Kidney* v. *Coussmaker*, 12 Ves. 136, the Master of the Rolls, going certainly upon the will, appears to consider *Byas* v. *Byas* and *Lindopp* v. *Eborall* as rightly determined. This is not the ordinary question, whether the want of surrender is to be supplied, but whether the testator has manifested an intention to pass the copyhold estate; which is however only another mode of expressing the same idea; as, if he has manifested that intention, all the cases prove, that the court will supply the surrender for creditors, the wife, or children. The question therefore is, properly, whether these words "all the rest, residue, and remainder of my real estate whatsoever and wheresoever, and of what nature and kind soever," manifest the intention to pass copyhold estate; and the courts have in all these cases said, that those words are not a sufficient indication of that purpose except for the satis-

faction of debts. It comes therefore to the same thing. If the intention is manifest, the surrender will be supplied; and the case of election arises: but the same authorities, that bind me to say, the intention is not manifest for the purpose of supplying the surrender, bind me also to say, it is not manifest for the purpose of raising a case of election. Upon the whole therefore I think this case rightly determined.

The decree was affirmed.

GRETTON *v.* HAWARD.

CHANCERY. 1818.

[*Reported* 1 *Swanst.* 409.]

By his will dated the 18th of June, 1747, Serle Edward Haward, being seised of certain estates at Charing Cross and in Saint Martin's, subject to a mortgage in fee, devised and bequeathed all his real and personal estate to his wife Ann Haward (she first paying his just debts and funeral expenses), and after her decease, to the heirs of her body share and share alike, if more than one; and, in default of issue to be lawfully begotten by the testator, to be at her own disposal; and he appointed his wife sole executrix and residuary legatee.

The testator died in 1766, leaving Ann Haward his widow, and Edward Haward, Ann Haward, (afterwards Ann Gardner,) Elizabeth, William, Francis, and James Haward, his six surviving children by her, of whom Edward, Francis, and James died intestate and without issue, leaving William their heir.

Ann Haward, the testator's widow, entered into possession of his estates, and being advised that under his will she took an estate tail, and that, the remainder in fee being in herself, she might, by levying a fine, acquire the power of disposing of the estates devised to her, on the 8th of September, 1807, executed a deed, covenanting to levy a fine, (which was afterwards levied,) and declaring, that it should enure to such uses as she should by deed or will appoint.

By her will dated the 7th of August, 1809, Ann Haward devised three messuages, (part of her husband's estates,) as to one moiety, to her grandson George Gardner in fee, and as to the remaining moiety, to B. Page, W. Watson, and R. L. Appleyard, their heirs and assigns, in trust to sell and stand possessed of the purchase money, in trust for Jane Haward, the widow of the testatrix's late son William Haward, and for such of the children of William Haward living at the testatrix's decease, as being sons should attain twenty-one, or being daughters should attain that age or be married, equally to be divided between Jane Haward and such children; with remainder, in case of all dying before their shares vested, to George Gardner, his executors, &c.; and

the residue of her late husband's estates she devised to her daughter Elizabeth Haward in fee. The testatrix then devised to Page, Watson, and Appleyard, an estate at Nine Elms in the county of Surrey, to which she was entitled in her own right, upon trust, till each of the children of her late son William Haward, living at her decease, should attain the age of twenty-one years or die under that age, to permit Jane Haward to enjoy it, (if she should so long continue unmarried,) to the intent that the produce might be applied by her towards the maintenance of herself and the child or children of William Haward, and upon farther trust, as soon as each of the children of William Haward, living at the testatrix's decease, should attain the age of twenty-one years or die under that age, to sell the premises and stand possessed of the purchase money upon such trusts, for the benefit of Jane Haward and the children of William Haward, as before expressed concerning the money to arise from the sale of the moiety of the three messuages devised to them; but in case no child of William Haward should live to attain a vested interest, upon trust for Elizabeth Haward, her executors, &c. The testatrix devised and bequeathed to Elizabeth Haward the residue of her real and personal estate, and appointed her executrix.

Ann Haward died in February, 1810, leaving William Haward the younger her grandson and heir, (heir also of his father the late W. Haward, and of his grandfather the testator Serle Edward Haward,) and the remaining children of the late W. Haward and George Gardner, her grandchildren, and Elizabeth Haward her only child.

William Haward, who died shortly before his mother Ann Haward, by his will, dated the 27th of December, 1808, devised all his real estates to Henry Gretton and Isaac Andrews in fee, upon trust to sell and stand possessed of the purchase money, and also of his personal estate in trust, as to one-seventh, for his wife Jane Haward, her executors, &c., and as to the remaining six-sevenths, for all his children, living at his decease or born in due time afterwards, in equal shares, with benefit of survivorship between them, in case any should die under the age of twenty-one years, with remainder, in case of the death of all such children, for Jane Haward, her executors, &c. He appointed his wife, and Gretton and Andrews, executrix and executors, and declared that the provision made for her, was intended in full satisfaction of her dower or thirds.

William Haward died in May, 1809, leaving W. Haward the younger his eldest son and heir, and Jane Haward his widow, and five younger children.

In 1811, the trustees named in the will of W. Haward, and his widow and younger children, instituted the present suit against Elizabeth Haward the surviving daughter of Serle Edward Haward, George Gardner one of his grandsons, William the eldest son and heir of William Haward deceased, the trustees named in the will of Ann Haward, and the mortgagees; insisting that under the will of Serle Edward Haward, his widow Ann Haward took only an estate for life,

and that William Haward, as his heir, was entitled to the reversion in the devised estates, subject to the life interests of the widow and of the other children, or if the children took estates in fee simple, then, that W. Haward was entitled to one-sixth of the devised estates in his own right, and to three-sixths as heir of the three children of Serle Edward Haward who died without issue.

The bill prayed that the will of William Haward might be established, and the trusts carried into execution; that the will of Serle Edward Haward might be established, and the interests taken thereunder by the late Ann Haward and William Haward declared; and that such part of the premises as passed to William Haward under the will of Serle Edward Haward, or as his heir, or as the heir of his other children deceased, might be sold, and one-seventh of the produce paid to Jane Haward, and the remaining six-sevenths to the trustees named in the will of William Haward, in trust for his children.

At the hearing of the cause on the 5th of July, 1813, the Master of the Rolls directed a case for the opinion of the judges of the Court of Common Pleas, who certified, that under the will of Serle Edward Haward, his widow Ann Haward took an estate for life only in the devised premises; and each of her six children a fee simple in remainder expectant upon the mother's life estate, in one undivided sixth part of the premises, as tenant in common with the other five children.

By the decree on the 29th of July, 1816, the rights of the parties were declared conformably to this certificate; and it was further declared, that William Haward, at the time of making his will, and of his death, was as one of the six children, of Serle Edward Haward, seised of the reversion of one-sixth part of his estates, and of the reversion of three other sixth parts thereof, as the only surviving brother and heir of Edward, Francis, and James Haward; that Elizabeth Haward was, as one of such six children, seised in her own right of one other sixth part, and George Gardner, as the only child and heir of Ann Gardner (formerly Ann Haward), deceased, of the remaining sixth part; the decree also declared, that the children of William Haward must elect whether they would take under or against the will of Ann Haward; and James Haward and Edward Haward being infants, it was referred to the master to inquire whether it would be for their benefit to take under or against the will.

Under this decree, the adult children of William Haward, having elected to take against the will of Ann Haward, and the master having reported that the like election would be for the benefit of the infant; a petition was presented by Elizabeth Haward, stating, in addition to the preceding facts, that the estates of Serle Edward Haward, were let at rents forming a total of £870 per annum, of which the portion devised by Ann Haward to the petitioner, amounted to £600, the remainder being by her devised in moieties, (of £135 each,) one to George Gardner, the other, for the benefit of Jane Haward and her children by

William Haward, to whom the testatrix had also devised her own estate at Nine Elms, of the annual value of £115, and who therefore, under her disposition, would take to the amount of £250 only; that by the decree, the petitioner and George Gardner, take each, one-sixth of Serle Edward Haward's estates, amounting to £145 per annum, and Jane Haward and her children take the remaining four-sixth parts, amounting to £580 per annum, by which distribution, Gardner derives a benefit of £10 per annum, and Jane Haward and her children, (independently of the Nine Elms estate intended for them,) of £445 per annum, while the petitioner sustains a loss of £455 per annum. The petition prayed, that the petitioner might be declared entitled to the estate at Nine Elms, devised by Ann Haward, for the benefit of Jane Haward and her children, by way of compensation, as far as it would extend, for the loss sustained by the petitioner of the estates devised to her by Ann Haward, which Jane Haward and her children have elected to take against the will of Ann Haward; and that in taking the accounts directed by the decree, of the rents of Serle Edward Haward's estates, the master might allow to the petitioner a proper sum, in compensation for the rent of the estate at Nine Elms, from the death of Ann Haward, till the petitioner should be let into possession, to be paid from the share of Serle Edward Haward's estates, to which Jane Haward and her children should be found entitled.

The petition having, on the last petition day, been ordered to stand over for argument, was this day argued.

Mr. Horne and *Mr. Shadwell*, for the petition.

Mr. Wray, for William Haward, the heir of his father, of Ann Haward, and of Serle Edward Haward.

Mr. G. Wilson, for the plaintiffs.

The Master of the Rolls. [Sir Thomas Plumer.] The object in directing this petition to stand over for argument was to discuss, not the general doctrine of election, but the peculiarities of the case, and the question, on which few authorities occur, what disposition is to be made of the estate relinquished by a party who elects to take against the will? The principle of election is clear, not merely as an abstract theory, but as pursued to practical consequences. When a party elects to abide by the will, the practical consequence is, that he must relinquish his own estate, of which the will purports to dispose; and the court has in some instances directed him to execute a conveyance, in conformity to the intention of the testator, not leaving the estate to pass by the will, which would give to the devisee only an imperfect title. The doctrine is so stated by Lord Commissioner Eyre, in *Blake* v. *Bunbury*, 1 Ves. jun. 523, (concurring with many other cases,) and there the plaintiff, electing to claim "under the will, was decreed to convey the rent charge to the uses of the will." (Id. 527.) The court imposes an implied condition, that if the party accepts the estate, which the testator had power to give, he shall convey his own, over which the testator had no power, to the individual to whom it is

actually, but ineffectually, devised. If he refuses to abide by that condition, and preferring his own, rejects the estate offered to him on the terms under which, if at all, he must take it, renouncing the will, it is a practical consequence that he is not permitted to retain, but must relinquish, the benefits which it purports to confer on him. So far is clear; not as an abstract proposition, but as a practical contrivance. In most instances, the party has elected to abide by the will, and then no difficulty occurs. This case presents further peculiarities, in addition to the circumstance of election to take against the will. If, however, a clear rule is established, no theoretical objection can be suffered to interfere with it; if no rule exists, the court must on principle consider what is to be done in a new case. Being reluctant to innovate, more especially in a question of real property, I was desirous to ascertain whether it had not been settled by decision, that, in the event of election to reject the will, the estate relinquished by that election, shall be taken from the heir-at-law, and given to the disappointed devisee.

Noys v. *Mordaunt*, determined in 1706, is said to be the first case on the subject of election; and a great authority, Chief Baron Eyre (4 Bro. C. C. 24; 1 Ves. jun. 523) has described this practice of putting devisees to election, however reasonable, as a strong operation of a court of equity. I cannot say that I am at all satisfied that the mere circumstance of peculiarity in this case, that the heir-at-law is one of the individuals who have made election, ought to distinguish it. Though a party must be taken to have elected, still if a new right arises, not adverted to at the time, as no one is ever compelled to elect till the whole subject matter has been ascertained, and he knows all his rights on each side, the court would, according to its habit, indulge him with farther opportunity to be informed of his interests. It is to be considered also, that the heir is bound to elect, and has made election, not in the character of heir, but between two instruments in neither of which is that character concerned; he is required to declare whether he will abide by the will of Serle Edward, or by the will of Ann; of these he prefers the former, but that choice has no connection with his claim as heir. When the heir asserts his paramount title, no court is authorized *a priori* to impose any condition on him. Insisting on his right before the will was made, and declining to accept any benefit under it, what authority has this court to annex a qualification? To deprive him of a title prior to any will? I think, therefore, that neither of these points is conclusive; but the fair way of considering the question, and the true test, is this; supposing the heir not interested in either instrument, nor having made any election, to advance a claim to this *hereditas jacens*, alleging that the estate, not being accepted by the person for whom the testator destined it, is in effect given to no one, and therefore (as a devise lapsed by the death of the devisee in the life of the testator) devolves to him in his character of heir; supposing him thus neither affected by any antecedent acts, nor interested in the property under an instrument varied by the wills of his father or grandmother,

how would the court deal with his claim? On general principles, it might be said, that the estate not being in the event effectually given, the devisee (who cannot be permitted to enjoy a double benefit, both the property devised to him, and property the title to which is inconsistent with the will), must indeed relinquish it, but that what is then to be done with it, is a quite different question. The doubt is, does it pass to the heir, as, in the actual event, undisposed of, the will being frustrated: or come into the hands of the court, under an authority to apply it for the benefit of the person who has been disappointed? If that authority has been constantly exercised, however disputable in its nature, it cannot now be impeached.

Few cases are to be found on the subject, but it must be acknowledged that the language of the great judges by whom it has been discussed, proceeds to the extent of ascribing to the court an equity to lay hold on the estate thus taken from the devisee by the principle of election, and dispose of it in favor of those whom he has disappointed; not merely taking it from one, but, such is the uniform doctrine, bestowing it on the other. A doctrine not confined to instances in which the heir is put to election, and which may be said to bring him within the operation of the general principle, but prevailing as an universal rule of equity, by which the court interferes to supply the defect arising from the circumstance of a double devise, and the election of the party to renounce the estate effectually devised; and instead of permitting that estate to fall into the channel of descent, or to devolve in any other way, lays hold of it, to use the expression of the authorities, for the purpose of making satisfaction to the disappointed devisee: a very singular office; for in ordinary cases, where a legatee or devisee is disappointed, the court cannot give relief; but here it interposes to assist the party whose claim is frustrated by election. Such is the language of Lord Chief Justice de Grey, cited with approbation by Lord Loughborough; "the equity of this court is to sequester the devised estate *quousque* till satisfaction is made to the disappointed devisee." *Lady Cavan* v. *Pulteney*, 2 Ves. jun. 560. I conceive it to be the universal doctrine that the court possesses power to sequester the estate till satisfaction has been made, not permitting it to devolve in the customary course; out of that sequestered estate so much is taken as is requisite to indemnify the disappointed devisee; if insufficient, it is left in his hands. In the case to which I have referred, Lord Loughborough uses the expression, that the court "lays hold of what is devised, and makes compensation out of that to the disappointed party."

A distinction has been attempted between real and personal property: I cannot see a principle on which the court could think itself at liberty to sequester and distribute personalty, in the event not given to the individual intended, that would not apply equally to realty; the object being to direct the devolution of the property in a course prescribed by equity. Undoubtedly in the instance of personalty, satisfaction has been repeatedly given. In a case not reported (the name of one of the

parties I recollect was Brodie) the property being divided into eleven parts, the court followed it, for the purpose of satisfaction; and in several cases, anticipating either contingency, the decree has provided for the event of election to take against the will, by a direction for making compensation out of the estate. It would be too much now to dispute this principle, established more than a century, merely on the ground of difficulty in reducing it to practice, and disposing of the estate taken from the heir-at-law without any will to guide it; for to this purpose there is no will; the will destined to the devisee, not this estate but another: he takes by the act of the court; (an act truly described as a strong operation;) not by descent, not by devise, but by decree; a creature of equity.

If this doctrine were now advanced for the first time, some objections might seem to occur to it. The disappointment of the devisee not arising from any wrong done to him, or any right withheld from him, but resting in the loss of a gift, from a want of title in the testator to dispose of what is given, how does it afford any claim to compensation in a court of justice? The testator might have anticipated and provided for this event, and have, in such case, substituted one estate for the other; and, perhaps, if he were now living, this is what he might wish to do; but not having expressed any such intention in his will, how can the court supply the omission, and make a new will for him, giving one estate not devised, in lieu of the estate which was? In what way too is this to be effectuated, so as to invest this disappointed devisee with a clear and indefeasible title in the estate thus given him by the court? Did the estate pass under the devise or did it not? If in consequence of the election and the noncompliance with the implied condition, the devisee is precluded from taking the estate, and no other disposition of it is made by the will, must it not devolve on the heir-at-law as being in event undisposed of; and if so, what equity is there against the heir, supposing him no party to the election, to restrain him from recovering in ejectment; or if not restrained, how is any defence to be made against his claim under the devise, which the devisee is precluded, by his election, from availing himself of, as well in law, according to Lord Redesdale, as in equity? How too is the devisee ever to obtain the legal estate, or to perfect his title without a conveyance from the heir-at-law? And if there be no equity against him, how is a court of equity to compel him to part with his inheritance, favored as that title in general is both in law and equity?

If the other alternative is taken, the only way of avoiding the apparent contradiction of considering the estate to pass by the will for one purpose, and not to pass for another, is to separate the legal estate from the beneficial, and to allot the former only to the devisee, and reserve the latter for the disposition of the court; but where is the ground for that separation; the will, if it is to operate at all, having given both the legal and the equitable interest to the same person, and laid no ground in the intent of the devisor for any distinction in their destination?

The devisee's election to abide by his own estate may properly operate to preclude his taking the devised estate; but how can it make him take in a different character, and convert him into a trustee for another, to whom the testator has not expressed any intention to give it? The disappointed devisee in respect to the estate devised to another has no title whatever to that estate, either under or *dehors* the will; What equity then has he to it?

These are some of the difficulties which might have been urged by way of objection to this part of the doctrine of election, had it been now open to discussion; in the present case, however, some of these difficulties are obviated, and the doctrine in its full extent has been too long considered as settled to make it safe to disturb it.

The question then is, will the circumstances in which Elizabeth Haward is placed, prevent the application of this doctrine? Taking a benefit by the election, not of herself but of another, her situation is certainly in some degree peculiar. Under the election of the widow and children of William Haward to abide by the will of his father Serle Edward Haward, the estates of the latter becoming divisible, the petitioner takes one-sixth; the question is, whether having by the election of other parties, acquired a right not intended for her by her mother, she can now insist on satisfaction for the disappointment of the devise contained in her mother's will, while she enjoys a benefit which has come to her against that will? That question is certainly new; no case has occurred in which an individual in part satisfied, deriving from one source a partial, has been declared entitled to additional, compensation. It has been ingeniously argued, that as the doctrine of bringing into hotchpot antecedent portions, is not applicable to a case of partial intestacy, the doctrine of compensation cannot be applied to partial disappointment; but that analogy will not, in my opinion, justify a departure from the ordinary rule. If the petitioner is the only individual disappointed, being deprived of an estate of £600 a year destined to her, and taking an estate of £145 a year only, and if the estate at Nine Elms is now in the hands of the court, has not the established practice determined that it is to be applied in satisfaction of her as a disappointed devisee? To the extent of the difference between £145 and £600, she sustains that character. Difficulties in the calculation of quantity may be removed by a reference to the master; *plus* or *minus* cannot vary the rule: here is disappointment; and I think that the circumstances of novelty cannot so intrench on the entirety of the principle, as to authorize me in refusing compensation.

The only remaining question is, on what terms must compensation be made? From what time is the estate at Nine Elms to be given up to the petitioner? The election is retrospective; reverting to the time of the will, the parties electing reject all that comes under it: consequently they have in the interval enjoyed the property of another; to retain the past rents and profits which they have received with no other title than that conferred by the will, would be to claim under it; re-

nouncing the will, they admit that they have been in possession of an estate without title. There must be a retrospective account of rents and profits, and an account of sums expended for melioration of the estate, which must be reimbursed.

His Honor doth order that the said master's said report, bearing date the 20th day of May, 1818, be confirmed, and his Honor doth declare that the petitioner Elizabeth Haward is entitled to the estate of the testatrix Ann Haward, widow, in the pleadings named, situate at Nine Elms, &c., in and by her will devised to or for the benefit of the plaintiff, Jane Haward, widow, and her children, as and by way of compensation to the said Elizabeth Haward, as far as the same will extend, for the loss sustained by her of the estates and benefits devised to and intended for her, in and by the will of her mother the said Ann Haward, widow, which the said Jane Haward and her children have elected to take (under the decision of this court) against the said will; and it is ordered that the said Elizabeth Haward be forthwith let into possession of the said estate at Nine Elms aforesaid, and into the receipt of the rents and profits thereof accordingly; and it is ordered that the said master, in taking the accounts of the rents and profits of the testator Serle Edward Haward's estates, which are directed by the decree made in this cause, fix and allow to the said Elizabeth Haward, as between her and the said plaintiff, Jane Haward and her children, such sum as the said master shall think proper, by way of compensation, in the nature of occupation rent for the said estate at Nine Elms, from the death of the said testatrix, Ann Haward, widow, until the said Elizabeth Haward shall be so let into the possession thereof as hereinbefore directed; and it is ordered that the said master do take an account of all sums of money which he shall find to have been laid out and expended by the said plaintiff and her children, in repairs and improvements of the said estate and premises situate at Nine Elms aforesaid, since the decease of the said Ann Haward, during the time they have been in possession thereof, and it is ordered that the said master do deduct the same from what he shall certify to be due from the said plaintiffs by way of such occupation rent as aforesaid; and it is ordered that the plaintiffs and the defendant, William Haward, do pay unto the said Elizabeth Haward what the said master shall so certify to be due to her in respect of such occupation rent as aforesaid, after such deduction as aforesaid.

[1] See the reporter's notes to this case, and also to *Dillon* v. *Parker*, 1 Swanst. 359 (1818).

CARVER *v.* BOWLES.

CHANCERY. 1831.

[*Reported* 2 *Russ. & M.* 301.[1]]

By an indenture, dated the 16th of January, 1799, which was executed in contemplation of the marriage of the testator H. C. Bowles and Ann Garnault, a sum of £7,150 Bank Stock, which had belonged to Mr. Bowles, was settled upon the husband and wife and the survivor of them for life; and after the decease of the survivor, upon trust to transfer the Bank Stock unto, between, and amongst all and every the child and children, or such one or more child or children, or an only child of the said marriage, at such time or times, in such shares, proportions, manner and form, and with, under, and subject to such powers, provisoes, conditions, restrictions, and limitations over (such limitations over to be for the benefit of some one or more of such children, or his, her, or their issue), as the said H. C. Bowles and Ann Garnault should, in manner therein mentioned jointly appoint; and for want of such joint appointment, as the survivor of them should, after the death of the other, by deed, or by his or her will, or any codicil thereto, direct or appoint; and in case of no such direction or appointment by them, or by the survivor of them, and as to so much whereof no such direction or appointment should be made, upon trust for all the children in equal shares, and if but one, then to such only child, and to be paid and transferred at the times therein mentioned.

The marriage took place; there were five children of the marriage, two sons, and three daughters: and the wife died in the lifetime of the husband without having joined in any appointment of the Bank Stock.

In June 1799, there was paid in respect of the £7,150 Bank Stock, a bonus of £715 Five per Cent. Bank Annuities, which sum was transferred into the names of the trustees of the settlement; and in the following December, a memorandum, signed by the husband and wife, was indorsed on the settlement, by which it was declared that the £715 Five per Cent. Stock was to be subject to the trusts which the indenture declared concerning the Bank Stock. In the year 1802, a bonus in money was paid, which Mr. Bowles invested in the purchase of Bank Stock in the names of the trustees; and in June 1816, an addition of 25 per cent. was made to the stock by way of bonus. By these means, the Bank stock in the names of the trustees was augumented to £9,216.

The will of H. C. Bowles, dated the 18th of April 1827, after reciting that, by his marriage settlement and the indorsement upon it, £7,150 Bank Stock, and £715 Five per Cent. Bank Annuities, being an addition made to the Bank Stock in the nature of profit, were standing

[1] Part of the case is omitted.

in the names of trustees in trust, after his decease, for all or any one or more of his children, and in such manner, &c., as he should by will appoint, proceeded in the following words, — "Now, in pursuance of the said power or authority to me given or reserved in and by my said marriage settlement, and by force and virtue thereof, and of every power or authority to me given or reserved, or enabling me in this behalf, I do, by this my last will, &c., direct and appoint, give and bequeath the said sum of £7,150 Bank Stock, so mentioned in my said marriage settlement, and also the said sum of £715 Five per Cent. Bank Annuities, together with all such further additions in the nature of profit to be made to the Bank Stock in my lifetime, unto my five children, Henry Carrington Bowles, Ann Sarah Treacher, Jane Mary Reeves, Francisca Bowles, and John Bowles, equally to be divided among them, share and share alike. But I do hereby will and declare, that one-fifth part or share, so appointed and bequeathed to each of my said three daughters, of and in the said £7,150 Bank Stock, and £715 Five per Cent. Bank Annuities, is so appointed and bequeathed, and I do hereby, so far as I lawfully or equitably may or can, order and appoint, that the same shall be held and applied by my executors and trustees hereinafter named, upon and for the same trusts, intents and purposes, for the benefit of each of my said daughters and their issue, as are hereinafter expressed and directed of and concerning the one-fifth part or share hereinafter bequeathed in favor of each such daughter and her issue, of and in my residuary personal estate." These trusts were the trusts stated in the former part of this report. The will also contained a proviso "that no child, taking a share under any such appointment as aforesaid, shall be entitled to any further or other share of and in the remaining or unapplied part or parts of the said one-fifth part, unless and until he or she have brought his or her appointed share into hotchpot, and shall have accounted for the same accordingly."

At the date of the will, the £715 Five per Cents had been converted into a larger amount of Three per Cent. Stock.

Under these circumstances the following questions were raised.

I. Whether the appointment extended to the bonuses of 1802 and 1816, or was confined to the original sum of £7,150 Bank Stock, and the stock into which the £715 Five per Cent. Bank Annuities were converted.

Mr. Tinney and *Mr. Teed* argued that, by the express words of the will, the appointment was limited to the original amount of stock and the first bonus, and to such additions by way of bonus as might be made after the date of the will; and that there were no words which could be fairly extended to the intermediate bonuses.

The Master of the Rolls [Sir John Leach] was of opinion that the erroneous allusion in the will to the £715 as an existing Five per Cent. Stock, though it had been long converted into a different amount of a different stock, showed that the testator was not acquainted with the particulars of which the accumulated fund consisted, and that his

intention was to appoint the whole of that fund which was vested in the trustees of the settlement.

II. As the appointment was bad so far as it attempted to create trusts in favor of the children of the daughters, the grandchildren of the testator not being within the objects of the power, a second question was, whether the shares were well appointed to the daughters absolutely, or whether after the life estates given to the daughters, these shares were to be considered as unappointed.

If the shares were well appointed to the daughters absolutely, another question was, whether the restriction against anticipation or alienation and the limitations to the separate use of the daughters during their lives were valid, having regard to the terms of the power contained in the settlement.

The Master of the Rolls held that the words of appointment were sufficient to vest the shares absolutely in the daughters; that the attempt to restrict their interest by limitations to their issue, being inoperative, did not cut down the absolute appointment; but that it was competent to the donee of the power to limit the interests, which he appointed to his daughters, to their separate use and to restrain them from anticipation or alienation.

III. It was then contended on behalf of the issue of the daughters, that, as the testator had manifested a plain intention that the children of the daughters should take interests in the settled fund, and as, by the same instruments, he gave to his daughters shares of his residue, a case of election was raised against the daughters; and the daughters were bound to elect between giving effect to the appointment in favor of their children and the interests which they, the daughters, took under the will: *Whistler* v. *Webster*, 2 Ves Jun. 367.

The Master of the Rolls held that, the testator having made an absolute appointment in the first instance, no case of election was raised.

LANGSLOW *v.* LANGSLOW.

Chancery. 1856.

[*Reported* 21 *Beav.* 552.]

By the marriage settlement of Mr. and Mrs. Langslow, executed in 1818, certain funds were vested in trustees, for their benefit for their lives, and afterwards, in trust for the children, grandchildren, or other issue of the marriage, to be born before any appointment, as Mr. and Mrs. Langslow, or the survivor, should appoint; and for want of such appointment, upon trust for all the children of the marriage equally.

The settlement contained a clause, by which "no child" taking any part under an appointment, should share in the unappointed part, unless

he should bring the sum appointed to him into *hotchpot, "with the other children"* of the marriage. This hotchpot clause was, therefore, applicable only as between the children.

There were two children of the marriage, namely Robert William Langslow and William Langslow. Mrs. Langslow died in 1847, and Robert William Langslow, the son, died in 1849, leaving an only son, the plaintiff, Robert Langslow.

Mr. Langslow, in 1849 and 1851, appointed part of the fund to his son William. Mr. Langslow died in 1853, having made his will, dated the 28th February, 1850, by which he gave to his son William some policies and all other property which he might have at his death. He then proceeded as follows: — "He will have to bring into hotchpot that portion of the fund settled on the marriage of his dear mother, which has already been received by him, and then, *as I make no further appointment* under the power for that purpose, the whole settled fund will be equally divided between him and my little grandson," meaning the plaintiff.

The residue of the trust fund consisted of £2,894 19*s.* Consols, and the questions raised by the special case were: —

First, whether the will of Mr. Langslow operated as an appointment of the £2,894 19*s.* Consols in favor of the plaintiff.

Secondly, whether the defendant William Langslow was bound to elect to give effect to the intention expressed in the will, that the whole fund should be equally divided between the defendant William Langslow and the plaintiff, or, in default, renounce the benefits given to him by the will.

Mr. R. Palmer and *Mr. Villiers*, for the plaintiff.

Mr. Stallard, for the defendant William Langslow.

Mr. Freeling, for trustees.

The Master of the Rolls. [Sir John Romilly.] I disposed of the first question at the hearing, and on consideration I am confirmed in the view I then took. The testator, when he made his will, had already appointed a portion of the fund to William; he refers to that circumstance and says, "I make no further appointment." How can it be contended, that this is an appointment? It is only necessary to refer to the words, to show that it can neither be so, either in form or in intention. It may be said, that if he had understood what the effect would be, he would have made an appointment, but that admits there was no appointment. I am, therefore, confirmed in the opinion I formerly expressed, that this is not an appointment, and the remaining fund must, therefore, go as in default of appointment.

The next question is, whether there is a case for election. I was desirous to look at the authorities, and I have since been referred to the case of *Blacket* v. *Lamb*, 14 Beav. 482, which was decided by me, and appears to me to be exactly this point, and decisive as to the question of election. The expression here is this: — "He will have to bring into hotchpot that portion of the fund" already received by him,

and then, as I make no further appointment, the whole will be divided between him and my grandson. This shows how he expected and believed the property would go, but it is no disposition of any part which creates the obligation to elect. It is sufficient to refer to the marginal note of *Blacket* v. *Lamb*, which appears perfectly correct; it is this: — "A testator duly appointed a fund in favor of objects of the power absolutely, and he also bequeathed to them his own property 'especially requesting them' to leave the appointed fund to persons not objects of the power. Held, that this did not raise a case for election. Held, also, that the result would have been different, if there had been a direct appointment of the subject of the power to strangers." There it was held, that a mere desire, expectation or wish, did not create any case of election.

This case cannot, I think, be put higher; and I am therefore of opinion, that this special case must be answered by stating, that there is no appointment by this will, and no case for election.[1]

WOOLRIDGE *v.* WOOLRIDGE.

CHANCERY. 1859.

[*Reported H. R. V. Johns.* 63.]

IN 1809, by the settlement on the marriage of James Woolridge, since deceased, and Caroline his wife, two sums, now represented by £2500 Three per Cent Consols and £1897 14*s.* 9*d.* New Three per Cent. Long Annuities, were settled upon certain trusts for their benefit during their respective lives; and after the decease of the survivor, upon trust, in the events which happened, for the children of the marriage, at such time and times, and in such proportions, manner, and form as Caroline should by deed or will appoint; and in default of appointment, upon trust for all the children of the marriage equally.

The plaintiff Otway Woolridge, and the defendants James Woolridge and Caroline Biscoe, now the wife of the defendant William Biscoe, were the only children of the marriage.

In 1825, Caroline Woolridge, having survived her husband, and being possessed of personal estate and effects of her own, which remained in her possession at her death, made her will, by which, after reciting her marriage settlement, in exercise of the power therein contained, she directed and appointed that George Treweeke, the surviving trustee under her settlement, should, from and immediately after her decease, stand possessed of the said stock, and the dividends thereon, upon the trusts thereinafter declared of the same; and as to all other real and personal estate and effects over which she had any disposing power, or

[1] See *Box* v. *Barrett*, L. R. 3 Eq. 244 (1866).

which should belong to her at her death, she devised and bequeathed the same to George Treweeke and Humphry Grylls, upon the trusts thereinafter declared — that was to say, upon trust, out of the dividends, interest, and annual proceeds of all and singular the said trust moneys and premises, to pay an annuity to her daughter Caroline (then a spinster), so long as she should continue unmarried; and as to all the rest, residue, and remainder of the said dividends, interest, and annual proceeds thereof, upon trust to pay the same unto and between her said two sons, James and Otway, their executors, administrators, and assigns, as tenants in common; and from and immediately after the marriage of her said daughter, then upon trust to assign and transfer all and singular the said trust moneys and premises unto and between her said sons and daughter, in equal shares and proportions, as tenants in common. The testatrix then proceeded by her will to direct that the portion of her said daughter should, at the discretion of the trustees, be either paid to her husband upon his making a competent settlement on her and on her issue, or otherwise should be settled on her and her issue in such manner as the trustees should think proper and expedient; and that the portions of her sons should be considered as vested interests at twenty-one, and the portion of her daughter on her marriage. Then, after making provision for survivorship between her children, in case any of them should die before the respective times aforesaid, and giving to her daughter in the event of her not marrying a power of testamentary appointment over the share to which she would be entitled in case of marriage, the testatrix provided, that, in case her son James should through ill health be incapacitated from pursuing any profession whereby to gain his livelihood, she directed the trustees to pay him out of the dividends, interest, and annual proceeds of the trust premises an annuity of £80, to be in lieu of his share of the principal of the trust premises, which should in that case be divided equally between her other children the said Caroline and Otway.

By a codicil, in 1850, after referring to her daughter's marriage with the defendant Biscoe, the testatrix directed that whatever sums of money her daughter would become entitled to under her will, should, as to the income thereof, be enjoyed by her for her own sole use and benefit during her life; and that after her death the principal money should belong to any children she might leave at her death, to be equally divided amongst them. And after stating, that, from the afflicted state of her eldest son James (then a lunatic), it would be found that she had amply provided for his maintenance and comfort in her will, as to any sums of money to which her son Otway might become entitled under her will, she directed that the income thereof only should be received by him during his life, and after his death the principal should be equally divided between any children he might leave; and if no children, or he at his death should be a bachelor, he had her full consent to his disposing of his share to his sister or amongst her children, as his own in-

clination and judgment might dictate: and in case of his marriage, it was the testatrix's wish that the life estate in the income should be enjoyed by his wife after his decease.

The testatrix died in 1852. The plaintiff was a bachelor.

The special case stated that James Woolridge was, through ill health, permanently incapacitated from pursuing any profession whereby to gain his livelihood, and was a lunatic within the meaning of the Act 13 & 14 Vict. *c.* 35.

The questions for the opinion of the court were, in effect, to what interest the plaintiff and the defendant Caroline Biscoe, or her husband in her right, were entitled in the said trust funds.

Mr. Sandys, for the plaintiff, and *Mr. Wickens*, for the defendant, Caroline Biscoe.

Mr. Law, for the children of Caroline Biscoe, ten of whom were infants.

Mr. Melville, for the defendant James Woolridge, his special guardian appointed under the Act, and the surviving trustee of the will.

Vice-Chancellor Sir W. Page Wood. The first question raised by the argument, which relates to the *quantum* of interest which the parties take in the settled funds (irrespectively of the question as to election), falls clearly within the authority of *Carver* v. *Bowles*, 2 Russ. & My. 304, 308.

The testatrix begins her will by appointing the whole of the settled funds upon the trusts thereinafter declared, and then, after devising and bequeathing her residuary real and personal property to trustees upon the same trusts, she declares those trusts to be "from and immediately after the marriage of her said daughter, then upon trust to assign and transfer all and singular the said trust moneys and premises unto and between her said sons and daughter, in equal shares and proportions, as tenants in common;" after which there is a proviso, that, in case her son James should, through ill health, be incapacitated from pursuing any profession whereby to gain his livelihood, the trustees are to pay him, out of the annual proceeds of the trust premises, an annuity of £80, to be in lieu of his share of the principal of the trust premises, "which shall in that case be divided equally between my other children, the said Caroline and Otway."

That appointment in the will is followed by various attempts on the part of the testatrix, partly in her will, but chiefly in the codicil, to modify the interests so appointed in favor of her daughter Caroline and her son Otway, and to give ulterior benefits to their children who are not objects of the power.

I apprehend, that the principle upon which the court has acted in all cases of this description is similar to that which was followed in *Mayer* v. *Townsend*, 3 Beav. 443; where, there being in the first instance an absolute direction in a will to the trustees to raise a sum of money for the testator's daughter, followed by a direction to invest it, and to pay the

interest to the daughter for her life, for her separate use, with remainder to her children absolutely (there being, of course, no ultimate limitation over), the daughter dying without ever having had any child, her personal representatives were held to be entitled to the fund, the court being of opinion that the subsequent directions did not operate as a revocation of the original bequest in favor of the daughter, but were merely directions as to the mode in which that bequest should be enjoyed.

Here, as in *Carver* v. *Bowles*, the directions which the testatrix has superadded to the interests appointed by her will in favor of the plaintiff and the defendant Caroline, so far as they tend to cut down those interests to estates for life, with remainder to their children, are invalid, as being in favor of persons who are not the objects of the power; and, being so invalid, according to the rule adopted in that case, the appointees take absolutely.

The second question, which is, whether or not a case of election is raised under circumstances of this description, is one of a little more difficulty; for, although the same question arose in *Carver* v. *Bowles*, Sir John Leach, while deciding that the parties were not put to an election, gives no reason for his decision, except that "the testator having made an absolute appointment in the first instance, no case for election was raised." The principle, however, of that decision appears to have been this: — and so it seems to have been understood in all the subsequent cases in which *Carver* v. *Bowles* has been cited, — that, where there is an absolute appointment by will in favor of a proper object of the power, and that appointment is followed by attempts to modify the interest so appointed in a manner which the law will not allow, the court reads the will as if all the passages in which such attempts are made were swept out of it, for all intents and purposes; *i. e.*, not only so far as they attempt to regulate the *quantum* of interest to be enjoyed by the appointee in the settled property, but also so far as they might otherwise have been relied upon as raising a case of election.

That appears to me to be the clear result of the authorities; and in conformity with that view I must hold that the plaintiff and the defendant Caroline are each of them entitled to a moiety of the settled funds, subject, in the case of each, to a moiety of the annuity of £80 charged by the testatrix on those funds and on her residuary estate; the defendant Caroline taking her moiety during her life (as in *Carver* v. *Bowles*) for her separate use.

Decree accordingly.

IN RE FOWLER'S TRUST.

CHANCERY. 1859.

[*Reported* 27 *Beav.* 362.]

JOHN FOWLER by his will, dated in 1788, devised freeholds and a copyhold estate called Vilner to the use of his son Charles Fowler for life, with an exclusive power of appointment to his children and grandchildren (as had been decided in *Fowler* v. *Cohn*, 21 Beav. 360) and in default of appointment, to the use of his children in tail: and he bequeathed £4000 in trust for his son Charles for life, and from and after his decease in trust to pay, assign and transfer the principal sum of £4000, or the stocks or securities wherein the same might be invested, unto such one or more of the children of his said son Charles, whether born in the testator's lifetime or after his decease, who, being a son or sons, should respectively live to attain his or their age or ages of twenty-one years, when and as they should respectively attain the same, or, being a daughter or daughters, should live to attain her or their respective age or ages of twenty-one years or be married, when and as they should respectively attain the said age or ages or be married, which should first happen, in such parts, shares and proportions, manner and form as his son Charles by any deed or writing, or by his last will and testament in writing, should direct, limit, give or appoint the same, and in default of such appointment in trust to pay, transfer and assign the same unto and amongst all and every the children of his son Charles (whether born in the testator's lifetime or after his decease) who, being a son or sons, should live to attain his or their respective age or ages of twenty-one years, or being a daughter or daughters, that age or day of marriage, which should first happen, equally to be divided between them, if more than one, share and share alike.

The testator died in 1790. His son Charles had seven children who attained twenty-one, two of whom were dead at the date of his will.

Charles Fowler by his will, dated in 1848, appointed eight-tenths of the £4,000 to five of his children, and he appointed the remaining two-tenths to his granddaughter, Eliza Sarah Lavinia Cohn (the only child of a deceased son), and he appointed the freehold and copyhold estate amongst his four children and his granddaughter.

Charles Fowler died in 1843, possessed of a few trifling movables, but of no other property of his own. The eight-tenths of the appointed fund were paid to his five children, but the remaining two-tenths, appointed to his granddaughter, were paid into court under the Trustee Relief Act. This petition was presented by the granddaughter and her husband, praying a declaration that the two-tenths of the £4,000 had been well appointed to her, and that it might be paid out of court to her husband.

Mr. Lloyd and *Mr. Amyot*, for the petitioner.
Mr. Follett and *Mr. Surrage*, contra.
Mr. Shapter, for the trustees.

The Master of the Rolls. [Sir John Romilly.] On the best consideration I can give to this case, I am of opinion that it does not raise any case of election. A case of election arises where a testator, whether under a power or not, gives property which belongs to one person to another, and gives to the former property of his, the testator's; in that case the former is bound to elect whether he will give effect to the disposition of his own estate in favor of the latter, and if he will not, then he cannot take any of the benefits intended for him by the will, and which are thereupon made available for compensating the disappointed legatee or devisee. This is not the case here, for there is no property of the testator. If the testator has improperly exercised the power, so that the property will go as in default of appointment, it will be divisible among the seven children, five only of whom take benefits under this will, the other two are not named in it.

It is impossible to say that there is a case of election as to the two who take nothing under the will, and it is equally so as to the others. The case of *Bristow* v. *Warde*, 2 Ves. Jr. 350, lays down that the doctrine of election "never can be applied, but where, if an election is made contrary to the will, the interest that would pass by the will can be laid hold of to compensate for what is taken away; therefore, in all cases, there must be some free disposable property given to the person, which can be made a compensation for what the testator takes away. That (using the words of Lord Loughborough) cannot apply to this case, where no part of his property is comprised in the will but that which he had power to distribute." It is the same as if the two-tenths, which was appointed to one who was not an object, went over, as in default of appointment, to persons who had nothing to do with the freehold estate.

On the best consideration, I think this is not a case of election, and I must therefore declare that two-tenths of the fund have not been properly appointed, and that they go as in default of appointment.

WOLLASTON *v.* KING.

Chancery. 1869.

[*Reported L. R.* 8 *Eq.* 165.]

Sir W. M. James, V. C.[1] In this case a testatrix had a power of appointment over a considerable sum of money, a limited power of appointment in favor of the issue of the marriage, in contemplation of which the settlement containing the power was made.

[1] Only the opinion is here printed.

By a will purporting to be, amongst other things, an execution of the power, she appointed a considerable portion of the settled fund to her son for life, with remainders to such persons as he should by will appoint. There was a general residuary appointment of the settled fund subject to all other appointments made thereof to three daughters.

The three daughters took other benefits under the will in the testatrix's own property.

The son purported to exercise the power of appointment given by his mother to him.

My predecessor held that the appointment, so far as it gave the son a testamentary, and only a testamentary, power of appointment, was void as tending to a perpetuity, and he further held that the portion of the settled fund attempted to be subjected to that power went not as an unappointed part to the objects of the original settlement, but under the residuary appointment in the mother's will to the three daughters.

In this state of things the question arose which I have now to determine. The persons who would have taken under the conjoint operations of the son's will and the mother's will, if they had constituted a valid appointment of the trust fund, insist that the daughters, who take by reason of the mother having no power to make such disposition, taking also under the will property which the mother had the fullest power to dispose of at pleasure, ought to elect between the two benefits which they take.

The ordinary principle is clear that if a testator gives property by design or by mistake which is not his to give, and gives at the same time to the real owner of it other property, such real owner cannot take both.

And the principle has been applied where the first gift is made purporting to be in execution of a power; so that, if under a power to appoint to children, the donee of the power appoints to grandchildren, which is bad, and the children who are entitled to claim by reason of the badness of the appointment also take under the will other property, the grandchildren are entitled to put them to an election. But to this rule, so far as regards appointments, a notable exception is taken, viz., that when there is an appointment to an object of the power, with directions that the same shall be settled, or upon any trust, or subject to any condition, then the appointment is held to be a valid appointment, and the superadded direction, trust, or condition is void, and not only void, but inoperative to raise any case of election.

This rule has not been followed in the Irish case of *Moriarty* v. *Martin*, 3 Ir. Ch. Rep. 26, which is said to have received the approval of Lord St. Leonards. Notwithstanding that case and that approval, I feel bound by the current of the English authorities.

I have endeavored to extract from these cases a principle which I can apply to the decision of the case before me. The rule laid down by the Master of the Rolls in *Whistler* v. *Webster*, 2 Ves. 367, is, in general terms, "that no man shall claim any benefit under a will with-

out conforming, so far as he is able, and giving effect to everything contained in it whereby any disposition is made showing an intention that such a thing shall take place."

This rule, expressed in these terms, was certainly not applied in the case of *Carver* v. *Bowles*, 2 Russ. & My. 301, and the cases which followed it. There it was clear that certain persons were intended to take benefits under the will, and other persons were allowed to take other benefits without conforming to, and giving effect to, the first dispositions, and, in fact, after defeating them. But why? The only intelligible principle which I can find is that it was held that the failure of the first dispositions, so far as they failed, did, under the will itself, enure for the benefit of the legatees; that the legatees were allowed to retain both benefits because they took both as legatees under the will itself without calling in aid any other instrument or any adverse title. It results in this, that the rule as to election is to be applied as between a gift under a will and a claim *dehors* the will, and adverse to it, and is not to be applied as between one clause in a will and another clause in the same will.

It would seem a very strange thing that in construing the same instrument the court, dealing with a clause in which a fund is expressed to be given partly to A. and partly to B., should hold that the gift to A. being void, the testator's intention is that B. should take the whole; and then coming to another clause in which another fund is given to B., and no mention of A. at all, it should hold that there is an implied condition that B. should give back part of that which it was the testator's intention that he should take. It is also material that the reason why the gift fails is that there was an attempt to create a power in violation of the rules of law. I apprehend that it is not for this court to aid such an attempt, either by the application of the doctrine of election or otherwise.

The great difficulty, moreover, of applying the doctrine of election to such a case as this is strikingly exemplified in this particular instance by the conflicting claims which have arisen to the benefit which would arise from the application of that doctrine.

The appointees named in the son's will say, "By the conjoint operation of the two wills the mother has expressed her wish to give us certain benefits which have been intercepted by the daughters. Let the daughters make it good out of the mother's will." But the creditors of the son say, "No, you never could have taken the benefits; nothing has ever been intercepted from you; it being a general power of appointment, and the son being largely indebted, any appointment made by him would, by the application of another rule of equity, have gone to his creditors." It seems to me that there is great force in this contention of the creditors in destroying any claims of the specific appointees, but that their own equity to compensation by reason of the doctrine of election is far too complicated and remote to entitle them to the interference of this court. I, however, only rely on this conflict of

claims as showing the prudence of not extending rights under the implication of somewhat refined equities like the doctrine of election, beyond the simple cases which have been decided, and which are sufficient to provide for all cases ordinarily likely to occur, and for all cases for which there is any substantial object in providing.[1]

Mr. Willcock, Q. C., and *Mr. G. N. Colt*, for the plaintiffs.

Mr. W. M. James, Q. C., and *Mr. R. Horton Smith*, for Robert William King, the brother and executor of James Euseby King.

Mr. Kay, Q. C., and *Mr. Higgins*, for the daughters of the testatrix.

Mr. Druce, Q. C., and *Mr. T. Hughes*, for the legatees under the will of J. E. King.

Mr. C. C. Barber, for other parties.

COOPER *v.* COOPER.

House of Lords. 1874.

[*Reported L. R.* 7 *H. L.* 53.]

This was an appeal against a decision of the *Lords Justices* (Law Rep. 6 Ch. Ap. 15), by which a previous decision of *Vice-Chancellor Stuart* (Law Rep. 6 Ch. Ap. 16, *n.*) had been reversed.

Mr. W. H. Cooper was possessed, together with much other property, of an estate called Pain's Hill, near Cobham, in Surrey. He had three sons, William Henry, Rowland Edward, and Frederick John. By his will, dated the 30th of May, 1840, he gave his estate called Pain's Hill to trustees in trust to pay the rents, &c., to his widow for her life, and after her death to sell the same, and hold the proceeds, together with the proceeds of his other property, as his personal estate, in trust for any one or more of his children, grandchildren, &c., in such form and manner and in such proportions as his widow, "at any time or times, and from time to time, before each and every of my said children shall have attained the age of twenty-five years, by any deed, &c., in writing, shall, either absolutely, or with powers of revocation and new appointment, direct, limit, or appoint." The testator died in September, 1840. His eldest son William Henry became twenty-one in November, 1840; his second son Rowland Edward in July, 1845; and his third son Frederick John in October, 1847.

On the 5th of April, 1841 (and therefore before any of the sons had attained twenty-five), Mrs. Cooper, the widow, executed a deed of appointment, which recited that her husband had created certain trusts of Pain's Hill estate for her benefit, and had given it "subject thereto to go along with the residue of his real and personal estates, property,

[1] Cf. *In re Warren's Trusts*, 26 Ch. D. 208 (1884).

and effects," and that the trustees were to invest the proceeds subject to any appointment she might, before every of the testator's children had attained twenty-five, make, by any deed in writing, absolutely or with power of revocation. She then, after providing certain specific sums for investment for her three sons, gave the residue (which included the proceeds of the Pain's Hill estate), in trust for all the three sons equally to be divided among them, their executors, administrators, &c.; she then reserved to herself a power of revocation.

On the 10th of April, 1841, Mrs. Cooper made a will, by which, treating herself as still having complete disposing power over Pain's Hill estate, she gave it by name to her eldest son William Henry, absolutely. She afterwards made several codicils, varying some of the dispositions she had made of different portions of the property.

In July, 1845, Rowland Edward, the second son, married, and by this marriage he had two children, Rowland Burrard, born in July, 1846, and Edith Theresa, born in January, 1848. His wife died in February, 1849. He himself died in September, 1858, intestate, his mother, Mrs. Harriet Cooper, being still alive.

By a codicil dated the 1st of December, 1852, the testatrix confirmed her will so far as the gift of the estate of Pain's Hill to her eldest son William Henry Cooper was concerned, but in all other respects revoked her will. And in the same codicil, after many other bequests, she gave to the trustees the sum of £1000 upon trust to invest the same as therein mentioned, and to apply the income thereof towards the maintenance and education of her grandson Rowland Burrard Cooper (whether his father should or should not be of ability to maintain him) until he should attain twenty-one, and then transfer the principal to him. In case he should die under twenty-one the income was to be applied in like manner towards the education and maintenance of her granddaughter Edith Theresa Cooper (now Dashwood, one of the appellants) till twenty-one or marriage, and then to be transferred to her for her sole and separate use. She then gave a further sum of £1000 in exactly the same terms for the education and maintenance of Edith Theresa Cooper, with the like directions in case of her death for transfer to the use of Rowland Burrard Cooper.

She made four other codicils, by one of which (made after the death of her son Rowland Edward) she recited that by a previous codicil she had given her real estate in thirds to her three sons, she revoked the devise of one third to Rowland Edward and devised two equal third parts of the same share of her real and residuary personal estate equally between his two children (the present appellants), and the remaining third equally between her own two sons William Henry and Frederick John.

Mrs. Harriet Cooper died in May, 1863, and disputes arising as to the effect of the deed of appointment, and of the will, and the various codicils of Mrs. Harriet Cooper, under all of which interests could be claimed by her children and grandchildren, a bill was filed in Septem-

ber, 1863, and the cause was heard before Vice-Chancellor Stuart, whose decision was taken by appeal before the Lords Justices, who, in November, 1867, pronounced a decree (*Cooper* v. *Martin*, Law Rep. 3 Ch. Ap. 47) to the effect that the will not having come into operation until the death of the testatrix, and therefore after the prescribed period during which she had power to appoint, could not take effect as a new appointment under the power, and that the proceeds of the sale of Pain's Hill belonged in thirds under the deed of the 5th of April, 1841, to William Henry, to the next of kin of Rowland Edward, and to Frederick John.

William Henry then filed this bill to put the appellants, Rowland Burrard Cooper and Edith Theresa (now the wife of the Rev. R. L. Dashwood) the children of Rowland Edward, and also Frederick John the youngest son of the testator, to their election. Vice-Chancellor Stuart decided that there was no case of election. The Lords Justices reversed that decision (Law Rep. 6 Ch. Ap. 15), and this appeal was then brought.

Mr. Dickinson, Q. C., and *Mr. Fry*, Q. C. (*Mr. T. Rawlinson* was with them), for the appellants, the children of Rowland Edward Cooper and Mrs. Dashwood.

Mr. Greene, Q. C., and *Mr. Bristowe*, Q. C. (*Mr. Kekewich* was with them), for the respondents.

The Lord Chancellor [Lord Cairns], after fully stating the facts of the case, said: —

My lords, in that state of things, the testatrix not owning Pain's Hill, and having no disposing power over it, her attempt to dispose of it by her will clearly would raise a case of election against any person who, taking under her will, might be found to have an interest in the Pain's Hill estate. And before I examine the effect which that principle would have upon the appellants in this case, I would take the liberty of reminding your Lordships of two expressions of the general rule of the court on this subject, the one contained in the case of *Streatfield* v. *Streatfield*, Cas. t. Talb. 176, and expressed by Lord Talbot, and the other in the case of *Noys* v. *Mordaunt*, 2 Vern. 581, expressed by Lord Keeper Cowper. Lord Talbot says (Cas. t. Talb. 182–83): "When a man takes upon him to devise what he had no power over, upon a supposition that his will will be acquiesced under, this court compells the devisee, if he will take advantage of the will, to take entirely, but not partially, under it, as was done in *Noys* v. *Mordaunt*, there being a tacit condition annexed to all devises of this nature, that the devisee do not disturb the disposition which the devisor hath made;" and Lord Keeper Cowper says (2 Vern. 582), in the earlier case of *Noys* v. *Mordaunt*, "In all cases of this kind, where a man is disposing of his estate amongst his children, and gives to one fee simple lands, and to another lands entailed or under settlement, it is upon an implied condition that each party acquit and release the other."

Now, my lords, in addition to what I have already said, I should

remind your Lordships that at the time when the will of this testatrix was made all the sons were alive. At the time the principal codicil was made Rowland Edward had died, and died, as I have already said, intestate, and by that codicil large pecuniary benefits were given to the appellants in this case. Large benefits were also given to Frederick John Cooper, the youngest son of the testator. As regards, therefore, the persons interested in the proceeds of the sale of the Pain's Hill estate, your Lordships will observe that the eldest son would take Pain's Hill by the will, and would take one third of the proceeds of Pain's Hill under the appointment. As to him, therefore, no question with regard to election would be material. As regards the youngest son, he would take one third of the proceeds of the Pain's Hill estate under the appointment by deed, and he would take pecuniary benefits, which need not be specified, under the will. As to him, in the suit in which the present decree was made, a case of election was, under the circumstances, insisted upon by the bill. Effect was given to that case of election by the decree, and from that decree, as to him, there is no appeal. And, my lords, in truth, I apprehend there could be no appeal. In point of form, no doubt, what he was entitled to by the appointment was one third of the proceeds of the sale of Pain's Hill, and not one third of Pain's Hill in specie; but that I think your Lordships will consider to be mere matter of form. In point of substance, and in truth, whether he took the land as land, or took it in the shape of money arising from the sale of the land, is utterly immaterial. In the eye of the Court of Equity he was, in substance, the owner of one third of the Pain's Hill estate, and, as such, he was clearly bound to elect between that right under the appointment and the benefits given by the will.

That, my lords, brings us to the remaining third of the Pain's Hill estate. The second son had died intestate — the one third to which, had he lived, he would have been entitled, was part of his estate as an intestate. The case may be considered as if there had only been one next of kin, for the circumstance that we have here to deal with two out of four persons taking the intestate's estate, is entirely immaterial as to the principle. My lords, if there had been one next of kin entitled to this one third of the proceeds of the sale of the Pain's Hill estate, subject only to the payment of the debts and the administration expenses of the intestate, I apprehend that your Lordships would have no difficulty in arriving at the conclusion that just as the third son was, in substance, the owner of one third of the Pain's Hill estate, so, in substance, this sole next of kin of the second son was the owner of the remaining third, subject only to the payment of the debts and expenses.

My lords, it was very much pressed on your Lordships, in the extremely able argument we heard at the bar from the counsel for the appellants, that the interests of a next of kin in the estate of an intestate is an undefined and intangible interest, that it is a right merely to

have the estate converted into money and to receive a payment in money after the debts and expenses are discharged. My lords, no doubt the right of a next of kin is a right which can only be asserted by calling upon the administrator to perform his duty, and the performance of the duty of the administrator may require the conversion of the estate into money for the purpose of paying debts and legacies. But I apprehend that the rule of law, or the rule laid down by the Statute, which requires the conversion of an intestate's estate into money, is a rule introduced simply for the benefit of creditors and for the facility of division. For the benefit of creditors, and for the facility of division among the next of kin, the estate is to be turned into money, but as regards substantial proprietorship the right of the next of kin remains clear to every item forming the personal estate of the intestate, subject only to those paramount claims of creditors.

My lords, this right of the next of kin I find extremely well expressed in a book, which, on this subject, is a book of high authority — Bacon's Abridgment — in the part of it which treats of executors and administrators. Speaking of the right of the next of kin, and of the Statute regulating the succession to an intestate's estate, it says on the clause of the Statute which directs that no distribution shall be within a year after the death of the intestate: "It hath been adjudged that if a person entitled to a distributive share dies within the year, yet it is such an estate vested in him as shall go to his executor or administrator, for the Statute doth not make any suspension, or condition precedent to the interest of the parties, but it is a clause merely for the benefit of creditors; also this Statute, being in nature of a will for all persons who die intestate, ought in this instance to be resembled to the case of a residuary legatee, in which it is always holden, that if such a legatee die before the debts are satisfied, so that it doth not appear to how much the surplus will amount, yet the executor or administrator of such a legatee shall have the whole residue, &c., which remains over and not the executor of the first testator."

My lords, I apprehend that really goes far to dispose of this argument on the part of the appellants. If we look on the Statute of Distributions, as I think we ought to look on it, as in substance nothing more than a will made by the Legislature for the intestate, and liken this to the case of a person having made a will and having directed his debts and expenses to be paid, and having given over his clear residue to his three children and his widow — if, I say, we look at the case as if it had assumed these features, I apprehend your Lordships will be perfectly clear that the residuary legatees under such a will had a clear and tangible interest in specie in the Pain's Hill estate, just in the same way as the youngest of the three brothers, Frederick John, who directly took one third of the proceeds of the estate.

The appellants contended, with great ingenuity and skill, that if this were so, your Lordships could not stop short of the conclusion of holding that if you found, at the time the succession of this testatrix opened,

a creditor of the second son, who had been paid his debt, and who therefore was in possession, or who without payment of his debt, might have claimed to be put in possession, of a certain portion of the intestate's estate, in order to satisfy his claim, you would be obliged to hold, supposing he had received a benefit under the will of the testatrix, that he also would be obliged to elect between that benefit and the portion of the intestate's estate which might be required for the payment of his debt. My lords, I apprehend the two cases are perfectly distinct; and I would suggest to your Lordships a test which will at once show the difference between them. Can any person doubt but that one of these next of kin might, before the administration of the estate of the intestate, have released to another next of kin, or have assigned to a third party, his interest in any specific portion of the estate of the intestate, in any specific item of the estate of the intestate, subject only to that item bearing its share of the administration expenses? I apprehend it to be quite clear that a next of kin could take that course. But, my lords, could a creditor do so? Could a creditor, before payment of his debt, say, I will release to you, or I will assign to you my interest in such an item of the estate of the intestate? Clearly a creditor could do nothing of the kind. He is a person who has no interest whatever in any specific portion of the estate of the intestate. He has a personal claim merely for the payment of his debt, to which effect might be given, and would no doubt be given in the proper court, by securing the assets and obtaining payment for him out of the assets.

My lords, that disposes, I think, if your Lordships take that view, of the main question which was argued at the bar. The two children, who are two of the next of kin of the second brother (their father), take benefits under the will: — they also take, in substance, an interest in an aliquot share of the proceeds of the sale of the Pain's Hill estate as next of kin of their father, and they must elect between their interest under the will and their interest which would be in opposition to the will.

But, my lords, it was then said that at all events if they elect they must only elect between that interest which they take under the codicil to the will of the testatrix made after their father had died, and need not take into account in election a legacy of £1000 which had been given to each by the will of the testatrix made before their father died. My lords, I can see no ground for any such distinction. It appears to me that the rule is a rule, as it was expressed by Lord Talbot, calling on them to elect between the whole of their benefits under the two titles under which they claim, and that no distinction is to be made founded on some supposed intention or absence of intention on the part of the testatrix when she made one or other of her two testamentary dispositions. The rule, as was said during the argument at the bar, does not proceed either upon an expressed intention, or upon a conjecture of a presumed intention, but it proceeds on a rule of equity founded upon the highest principles of equity, and as to which the

court does not occupy itself in finding out whether the rule was present or was not present to the mind of the party making the will.

My lords, that would exhaust the case, except that I must call your Lordships' attention to two provisions, or, rather, to one provision, of the decree, and to the absence of another provision which, as it appears to me, ought to be found there. My lords, I do not find in the decree any direction with regard to one of the appellants, who is a married woman, and who cannot make an election for herself. As to that, I think your Lordships will be of opinion that, following the ordinary course, there should be an inquiry made whether it would be for the benefit of Edith Theresa Dashwood and her children to take under the provisions of the will and codicils, or against the same.

Then, my lords, the Lords Justices appear to have thought that inasmuch as before the share of the appellants in the proceeds of the Pain's Hill estate could be ascertained, there must be a deduction made in respect of the debts of the intestate which might be paid out of those proceeds, those debts should be looked at as at the date of the death of the testatrix, and according as at that moment they had been paid out of one or other portion of the estate of the intestate, so the account, for the purpose of the election, should be taken. But I think your Lordships will rather be of opinion that the proper course would have been to apportion all the debts and all the administration expenses of the intestate over the whole of the assets of the intestate ratably, and in that way to find what proportion of the debts and expenses the Pain's Hill estate ought to have borne. If that is your Lordships' opinion, I would suggest that the decree should be varied thus: And their Lordships do order that for the purposes of such election, to be made by the defendant, Rowland Burrard Cooper, and by or on behalf of the said Edith Theresa Dashwood, and for any purpose consequential thereon, the debts and funeral expenses of Rowland Edward Cooper, and the expenses of administering his estate (such expenses, if not yet ascertained, to be estimated), are to be treated as apportioned ratably between those parts of the proceeds of the sale of the Pain's Hill estate so appointed as aforesaid, and the rest of his general personal estate, in proportion to their respective shares or amounts. My lords, if your Lordships adopt those alterations in the decree which I have ventured to suggest, I will also suggest to your Lordships that the main part of the decree should be affirmed, but that there should be no costs of this appeal on either side.

Lord Hatherley. My lords, I entirely concur in the view which has been taken of this case by the noble and learned lord on the woolsack, and he has so fully and clearly stated his view, and the law of the court with reference to cases of this description, that I have very few words indeed to add to what has been already said on the subject.

I apprehend, my lords, that the difficulty which has been supposed to exist in this case arises, in a great measure, from something which has been thrown out in other cases, and, notably, in the case which was

cited before us of *Lady Cavan* v. *Pulteney*, 2 Ves. Jun. 544, with reference to the non-application of the doctrine of election to what, in that case, was called a derivative interest. But, my lords, the derivative interest in that case was simply this, — A lady having been put to her election, the question was whether her husband, who was tenant by curtesy in the estate which she elected to take, was again to be put to his election in respect of an interest which he took under the will, and which those who argued for the election said he ought not to be allowed to benefit by, unless he gave up his interest as tenant by the curtesy. I need not discuss that case. Your Lordships will see at a glance that the position of the parties was entirely different from that which we have here. We have here the simple case of certain parties in possession, by right, of a fund to which they were entitled by the will of the original testator, and also as legatees under a will of the testator's widow, which latter will affected to dispose, but could not of course effectually dispose, of the interest they possessed under her husband's will. That would, according to all the authorities, be a simple case, in which the testatrix having attempted to dispose of what was not her own, also gave benefits to the persons who, at her decease and at the opening of the testamentary document, and of the succession thereunder, are found to be both legatees under the will, and also owners of the property that she has attempted to dispose of.

Now, my lords, although the law which has for a very long period been laid down on this subject was for a time a little open to doubt and difficulty as to the exact expression which ought to be given of the principle on which it was founded, namely, whether it should be conditional, including, therefore, forfeiture in the event of any one taking under a will endeavoring to disappoint it, or should be compensative, yet still the main principle was never disputed, that there is an obligation on him who takes a benefit under a will or other instrument to give full effect to that instrument under which he takes a benefit; and if it be found that that instrument purports to deal with something which it was beyond the power of the donor or settlor to dispose of, but to which effect can be given by the concurrence of him who receives a benefit under the same instrument, the law will impose on him who takes the benefit the obligation of carrying the instrument into full and complete force and effect.

Now, my lords, Mr. Fry, in the course of an ingenious argument, endeavored to take advantage of the expression that this is "an implied obligation," to reason thus with reference especially to a portion of the benefits taken by these present appellants under the will. He said, with respect to a portion of these benefits, namely, certain legacies of £1000, it could not possibly be implied that the testatrix had any intention that those legatees should give up any right connected with their father's interest when they took the benefit of the legacy of £1000, because at the date of the will no such right existed in them; their father was alive, he it was who was entitled to the subject-matter

which is now in question in this suit with regard to election, and not they, and that the testatrix herself indicated on the face of the instrument that she was aware of his existence, and contemplated his existence subsequent to her own decease, regarding him as the person who ultimately would be found to be in possession of the property now sought to be distributed under the doctrine of election. My lords, the fallacy of that is quite obvious. The condition, or rather obligation (which is the expression I prefer, regard being had to the dispute as to condition involving forfeiture), the equitable duty which the law imposes on a person claiming under an instrument, of giving full effect to it, as far as it would be otherwise ineffective, except through his concurrence, is simply this, — the law inquires on the death of the testator, when the will comes into operation, what is his intention, as expressed on the whole will, with reference to the disposition of that which he considers to be his property, and it being found clearly and distinctly (for it must be clearly and distinctly found) that he has expressed his intention of disposing of what belongs to another — when once that is ascertained completely, there is nothing else which the law implies, with regard to his intention, beyond the ordinary intent implied in every man who affects by a legal instrument to dispose of property, that he intends all that he has expressed, and, among other things, that he intends to dispose of property as to which he has so expressed an intention, though it really does not belong to him. When once that intention is ascertained there is nothing else remaining to be done, with reference to election, than to see who is in possession and who is the real owner of the property; and if you find him, who is the real owner of the property at the same time taking a benefit under the will which has erroneously endeavored to dispose of his property, then he must give effect to that intention, though founded in error, and give it full effect by either abandoning all his interest under the will, or making compensation to the extent of the value of the disappointed intention of the testator. That being the simple case, you then make no inquiry as to what may be supposed to have been the view as to those particular legacies, say the £1000, or any other specific legacy under the will, but all that you look at is this, does the person taking under the will any benefit whatsoever, of any kind or shape, possess the power of giving full effect to the will by releasing the interest he has in another subject-matter, which was not the property of the testator, but which was in terms disposed of by the will, and, finding that he has the power of so doing, you fix on him the obligation and duty of doing it.

My lords, that clears the ground very much, I think, as to all argument with reference to the supposed intentions of the testatrix in this respect. But then comes the argument which was exceedingly ably and forcibly put by Mr. Dickinson in the course of the discussion of this case, namely, that that which these appellants take is not a distinct interest, is not the thing given by the testatrix, but is simply a right to

have that thing, together with the other assets of the testator, disposed of by the administrator and applied to the payment of the debts of the intestate, and when those debts are paid and satisfied, then the balance (the balance only, and not this matter in specie) comes to the person now called on to elect. I think the noble and learned lord on the woolsack has so fully met and disposed of that argument, that it would be a waste of your Lordships' time for me to pursue it further. I may be permitted, perhaps, to add another illustration (which is in truth only another way of saying the same thing) to that which the noble and learned lord offered, namely, that, — in addition to the argument founded on the clear power of these persons interested in the testatrix's estate, to release their interest and right in this specific property, which has come to them in consequence of their rights under the will of the original testator, — there is a distinction between them and a creditor in this respect, that whereas a creditor could by no circumstance, and by no course taken by him, ever acquire a distinct interest in that particular chattel which is now in question — yet I take it that, whether it was a term of years, whether it was the produce of a sale, or whether it was any other specific chattel belonging to the intestate's estate, if there were a sole next of kin he could, by paying the debt of the intestate and satisfying the funeral and testamentary expenses, require that that property should not be sold and disposed of, and it would then become his alone, entirely and absolutely, in possession. What difference would it make if there were three or four next of kin? If they should choose to undertake the same process, and satisfy all the debts, and say that they desired to have the produce of this Pain's Hill estate, or whatever the specific property might be, what would there be to hinder them from taking that course and acquiring the property? No such course as that would be thought of (because it would be absurd) in the case of a creditor. A creditor would have no right to any particular chattel. All the right the creditors have is to be paid their debts out of that chattel, as well as out of other things; but their position as regards the specific property is wholly different from that of the next of kin.

My lords, I apprehend that there is substantially no difficulty in coming to the conclusion which the noble and learned lord on the woolsack has offered for our acceptance, and which concurs with the conclusion of the Lords Justices. My lords, I also entirely concur with the noble and learned lord in the view he has taken as to the alteration which is necessary to be made in the decree. I think it must have been a slip in the court below, that the debts of the intestate were directed to be ascertained as they existed at the death of the testatrix, and not as at the death of the intestate, because the interest taken by the next of kin is clearly an interest in every chattel that formed part of the estate of the intestate, subject to the payment, no doubt, of a proportionate part in value of the debts that existed at that time on the part of the intestate. Then, when you have found what is the interest they have,

you are in a condition to ascertain what it is that they are bound to give up in case they elect to take under the will. There must also be an inquiry as to whether it will be to the interest of the married woman to elect. And as we have to make these alterations, which are material ones, in the decree, I concur in the view expressed by the noble and learned lord on the woolsack that there should be no costs of the appeal.[1]

WHITE *v.* WHITE.

CHANCERY DIVISION. 1882.

[*Reported* 22 *Ch. D.* 555.]

JOHN R. WHITE, of Bruton, Somerset, was twice married, and by his first wife, Clary White, he had seven children, one son and six daughters, and by his second wife, Ann White, he had two children, one son and one daughter.

On his first marriage a settlement was made, dated the 8th of September, 1845, whereby he settled his reversionary interest in part of an estate called the Coombe Hill estate for the benefit of himself and Clary White for their lives, and subject thereto upon trust for the children and issue of himself and the said Clary White in such manner as (in the events which happened) he the said John R. White should appoint, with a gift, in default of appointment, to the children of the marriage.

Clary White died and J. R. White married again in 1869, but no settlement was made on the second marriage.

Previously to the date of his will the said John R. White had issue by his second marriage and acquired other shares in the Coombe Hill estate, and by his will, dated the 11th of November, 1872, after referring to the settlement of 1845, he continued, "In execution of the power of appointment given by the settlement, I appoint my shares in the Coombe Hill estate comprised in the said settlement unto my eldest son Walter, his heirs and assigns, but subject to the charges in favor of his brother and sisters in this my will hereinafter mentioned, and in every other respect I confirm my said settlement. I devise my remaining shares in the said Coombe Hill estate and the close adjoining which I have purchased unto my eldest son, his heirs and assigns, but subject to such charges in favor of his brother and sisters as shall equalize the shares of all my children in all my said property."

He then gave certain bank shares to his said eldest son, to be accounted for as part of his share, and "to be charged with such a sum as should equalize the shares of all his, the testator's, children in all his property."

[1] The concurring opinions of Lord O'Hagan and Lord Moncrieff are omitted.

The testator then directed that his sister Julia should be permitted to reside on a part of the Coombe Hill estate, which was included in the settlement, for her life at a specified rent.

He devised the residue of his real and personal estate to trustees for sale, and directed them to pay his widow an annuity, and to pay the remainder of the income to his children, and on his wife's death to pay the capital to his children then living.

This was an action for the administration of the estate of John Richard White.

In addition to the settled property sufficient was given by the will for the benefit of the elder son to enable the trustees by apportionment to equalize the shares of all the children.

The children of the second marriage and the testator's sister Julia not being objects of the power, the question arose whether they were entitled to enforce the dispositions of the settled property which were in excess of the power so as to raise a case of election in their favor, if the children of the first marriage declined to give effect to those dispositions.

Cookson, Q. C., and *B. B. Rogers*, for the plaintiffs, two infant children of the first marriage.

Everitt, Q. C., and *Rawlins*, for Walter, the elder son.

Cozens-Hardy, Q. C., and *Dyne*, for the children of the second marriage.

Fry, J., stated the two marriages of the testator and the settlement, and said: —

At the time of his will the testator John R. White had issue of his second marriage, who were of course not objects of the power contained in the marriage settlement. By his will the testator recited the settlement of 1845 made on his marriage with his first wife Clary as a settlement "whereby I conveyed to trustees therein named my reversionary interest after the decease of my mother to certain shares in an estate called Coombe Hill."

Now I pause here to observe that he describes this interest in the property which he had conveyed to his trustees as if it were still his own, and he calls it "my reversionary interest." That may be explained, it is said, by saying it was his reversionary interest at the date of the settlement, but I think the subsequent language shows he thought it was part of his property.

Then he recites the death of his mother and his wife, and he says, "Now I do hereby by virtue and in execution of the power of appointment given to me by the settlement appoint my shares in the Coombe Hill estate unto my eldest son Walter, his heirs and assigns, but subject to the charges in favor of his brother and sisters in this my will hereinafter mentioned, and in every other respect I confirm my said settlement." There, again, I stop to make this observation, that what he appoints he describes as "my said shares" as if they were still part of his property.

Then he proceeds to devise the other shares which he had acquired in the Coombe Hill property and the adjoining closes, which were in no way subject to the settlement of 1845 to his said son Walter "subject to such charges in favor of his brother and sisters as shall equalize the shares of all my children in all my said property."

Now it appears to me plain that the charges referred to in the first clause, namely, the charges on the settled shares in the Coombe Hill property are the same charges as those which are imposed on the other shares in the Coombe Hill property, and on the entirety of the adjoining closes. There is only one set of charges.

[His Lordship read the further clauses in the will relating to the gift of the bank shares, and the direction that the testator's sister should reside on part of the settled Coombe Hill estate, and continued as follows: —]

Now the first question arises in this way. The two first clauses in the will have made the settled property and the unsettled property subject to the same charges in favor of persons who are not objects of the power of appointment. Does that create a case of election in favor of those persons, namely, the children of the second family, who were clearly entitled under the terms of his disposition to charges upon both the settled and the unsettled property, or does it create no case of election at all? It is plain that they are objects of the charges on the settled property, and it is plain that the persons who take that settled property in default of the exercise of the power, are themselves objects of benefits conferred by gifts of the unsettled property. *Prima facie* therefore you have a case in which the persons who take the settled property take also under the will benefits out of the unsettled property, and if they take the settled property in a manner which defeats the intention of the testator, that would appear to give rise to a case for compensation to the persons who are so disappointed.

That this is the general rule as regards appointments can hardly be doubted. It has been stated by Sir W. M. James, when Vice-Chancellor, in *Wollaston* v. *King*, Law Rep. 8 Eq. 165, 174, in these terms, adopting the words of the judgment in *Whistler* v. *Webster*, 2 Ves. 367, that no man shall claim any benefit under a will without conforming, as far as he is able, and giving effect to everything contained in it, whereby any disposition is made showing an intention that such a thing should take place.

But there is a class of cases which at first sight appear to be in conflict with the generality of that rule. That class of authorities consists of *Carver* v. *Bowles*, 2 Russ. & My. 304; *Woolridge* v. *Woolridge*, Joh. 63, and other cases of the same description, including the case of *Wollaston* v. *King*, which I have just mentioned. In those cases the testator had exceeded the power vested in him by directing that certain property which he had in the first place appointed absolutely to an object of the power, should be held upon trusts or subject to conditions in favor of persons who were not objects of the power, but who

would probably be objects of any settlement or provision which might be made by the appointee. The question, therefore, arose whether those gifts to the persons not objects of the power were void, or whether the absolute appointment must be held good and the modifications be rejected, and the conclusion which the court arrived at was, that as there was an absolute gift to the object of the power, that must prevail, and the modifications which were not valid in law must be rejected; and the moment the court arrived at that conclusion it was apparent that no case of election arose: because the object of the power is the only person who takes: and there is no conflict between him and a person who is not an object of it. Therefore in those cases the whole question as to election fell to the ground.

The question I have to determine, therefore, is this: Can the gift to Walter stand, and the condition that it shall be subject to a charge be rejected so far as it is in excess of the power, or can the appointment to Walter take effect only so far as the testator intended him to take it? It appears to me that the question may be really stated in another way. Is the condition or charge in the present case such a disposition of the gift to Walter as according to the ordinary course of family arrangements in this country he would be likely to make? I think it is not. It differs entirely from an appointment to a person, subject to a declaration of trust for the benefit of the issue or husband or family of that person. It is an attempt by the testator to impose on the appointed property an obligation to produce an equality between the objects of the power and the other members of his family. I think, therefore, the present case is not within the principles of *Curzon* v. *Bowles*, and the cases I have referred to.

That being so, I hold that a case of election has arisen between the persons who claim in default of the exercise of the power, and those who claim under the gift in the will.

His Lordship then gave judgment on certain other points arising under the will.

IN RE VARDON'S TRUSTS.

COURT OF APPEAL. 1885.

[*Reported* 31 Ch. *Div.* 275.]

APPEAL of Mrs. Walker from a decision of *Mr. Justice Kay* (28 Ch. D. 124). The facts sufficiently appear in the report of the case in the court below, and in the judgment delivered by Lord Justice Fry.

The question raised was whether Mrs. Walker, on whose marriage, when an infant, £5,000 was settled upon trusts under which the income was to be paid to her for her sole and separate use without power of

anticipation, could take £8,573, which was afterwards bequeathed to her, without bringing it into the settlement in accordance with her covenant in the deed of settlement to settle after-acquired property, and without making compensation under the doctrine of election out of the £5,000. The trustees of the settlement disputed her right to take both sums, and claimed to have the income of the £5,000 applied in making compensation for those disappointed by her electing to avoid her covenant to settle. The executors under the will having paid the £8,573 into court under the Trustee Relief Act, and Mrs. Walker having petitioned the court for the payment of it to her, the question came before Mr. Justice Kay on originating summons under Order LV.

That learned judge decided that the income of the £5,000 should be applied in making compensation to the persons disappointed by Mrs. Walker's election.

Mrs. Walker appealed.

W. Pearson, Q. C., and *E. Ward*, for Mrs. Walker.

Hastings, Q. C., and *P. Kingdon*, contra.

Charles Parke, for the trustees of the settlement.

Stallard, for a son of the marriage.

Dec. 18. The following judgment of the court (LORD ESHER, M. R., and BOWEN and FRY, L. JJ.) was now delivered by

FRY, L. J. In the year 1860 a marriage was in contemplation between Mr. Walker and Miss Vardon. Thereupon a settlement was executed which contained, amongst other things, the recital of an agreement that the intended wife and husband should enter into the covenant thereinafter contained for the settlement of her future estate. By this settlement Mr. Walker, the intended husband, settled certain property upon trust for himself for life, then for his intended wife for life, and then for the children of the marriage; and by the same settlement Mr. Vardon, the father of the intended wife, settled other property upon the same trusts, except that as to £5,000, part thereof, the intended wife took the first life interest therein, for her separate use, with a restraint on anticipation in terms to be hereafter mentioned. The settlement contained a covenant by each of them, the intended husband and wife, to settle any after acquired property of the wife upon the trusts thereinbefore declared concerning the property of the husband, except that the ultimate trust in default of children was to be for the wife. This settlement was executed by both husband and wife, but the wife was at the date of the marriage an infant, though that circumstance does not appear on the deed.

In 1883, under a bequest to Mrs. Walker contained in the will of her deceased brother, she became entitled to £8,573 for her separate use. Mrs. Walker claims to receive this sum of £8,573, and also the income of the £5,000 in which she had a life interest in possession without power of anticipation. On the contrary the trustees of the settlement contend that she cannot take both, and that the husband and the children of Mrs. Walker are entitled to have the income of the £5,000

applied in compensation of their claims under the covenant to settle. Mr. Justice Kay has decided that the trustees' contention is right. Mrs. Walker has appealed.

Mrs. Walker contends that she is entitled to retain the benefit under the settlement because it is income settled to her separate use free from the power of anticipation: and that she is entitled to the benefit given to her by her brother's will because the will which gives it to her is operative, and the covenant which would take it away from her is inoperative.

As she was an infant at the time of the execution of the settlement and of the marriage, it is evident that her contention must prevail unless she can be reached by the doctrine of election. That doctrine rests, not on the particular provisions of the instrument which raises the election, but on the presumption of a general intention in the authors of an instrument that effect shall be given to every part of it, "the ordinary intent," to use the words of Lord Hatherley, *Cooper* v. *Cooper*, Law Rep. 7 H. L. 71, "implied in every man who affects by a legal instrument to dispose of property, that he intends all that he has expressed." This general and presumed intention is not repelled by showing that the circumstances which in the event gave rise to the election were not in the contemplation of the author of the instrument (*Cooper* v. *Cooper*), but in principle it is evident that it may be repelled by the declaration in the instrument itself of a particular intention inconsistent with the presumed and general intention.

For example, if the settlement in question had contained an express declaration that in no case should the doctrine of election be applied to its provisions, there seems to be no reason why such a declaration should not have full effect given to it. The late Mr. Swanston appears to us to have correctly enunciated the law on this point, when he said: "The rule of not claiming by one part of an instrument in contradiction to another, has exceptions; and the ground of exception seems to be, a particular intention, denoted by the instrument, different from that general intention, the presumption of which is the foundation of the doctrine of election." (1 Sw. 404, *n.*)

The settlement in the present case declares that the income of the fund in question should be paid to Mrs. Walker for her sole and separate use, that her receipt alone should be a sufficient discharge for the same, and that she should not have power to dispose or deprive herself of the benefit thereof in the way of anticipation.

What is the force and effect of this restraint on anticipation? It provides that nothing done or omitted to be done by Mrs. Walker at any given time shall deprive her of the right to receive from the trustees the next and every succeeding payment of the income of the fund as it becomes due. But if she be put to her election, and if by her election she deprives herself of the right to receive subsequent payments of the income until her husband and children are compensated, it follows that she has by the act of election, or by the default in performing her

covenant, deprived herself of the benefit of the income in the way of anticipation, which is the very thing which the settlement declares that she cannot do. This settlement, therefore, in our judgment, contains a declaration of a particular intention inconsistent with the doctrine of election, and therefore excludes it.

This conclusion appears to us consonant with the general understanding of men and women in England at the present day. A provision for a married woman who is restrained from anticipation is regarded as giving the highest security known to the law that the married woman shall, come what may to herself and her husband, have from half-year to half-year some moneys paid into her very hands to increase her comforts or to supply her with maintenance. And this security would be seriously imperilled if by the doctrine of election she could take in lieu of this inalienable provision a sum of money or other benefit which she might forthwith make over to her husband or squander at her choice. Suppose, to imagine events which nothing in the present case suggests as probable, suppose that Mrs. Walker were put to her election, that she took the £8,000, and that she lost her annual income of the £5,000, and immediately squandered or lost the £8,000, she might pass the rest of her life in that very poverty and need against which the inalienable provision of the settlement was designed to protect her.

Hitherto we have discussed this case as if it were unaffected by authority. But that is not entirely so. In *Willoughby* v. *Middleton*, 2 J. & H. 344, the late Lord Hatherley, then a Vice-Chancellor, decided that a married woman should be put to her election between certain benefits derived under a will for her separate use without any restraint on anticipation, and the life interest to her separate use without power of anticipation given to her under a settlement executed when she was an infant; and the decision in this case was stated without any expression of disapproval by Lord Selborne in *Codrington* v. *Lindsay*, Law Rep. 8 Ch. 578.

On the other hand, the late Master of the Rolls, Sir George Jessel, in *Smith* v. *Lucas*, 18 Ch. D. 531, criticised the decision of Lord Hatherly in *Willoughby* v. *Middleton*, and observed forcibly on the inconveniences which would follow if that decision were to prevail; and this case before the Master of the Rolls was referred to without disapproval by Earl Selborne in the House of Lords in *Cahill* v. *Cahill*, 8 App. Cas. 420, 427. Mr. Justice Chitty, in *In re Wheatley*, 27 Ch. D. 606, has followed the late Master of the Rolls, whilst Mr. Justice Kay has in the case now under appeal followed Lord Hatherley. In this conflict of opinion in the courts of the first instance and in the absence of any decision in the House of Lords or in this court we feel ourselves at liberty, and therefore bound, to decide the question before us upon principle.

Upon principle we are of opinion, for the reasons already given, that the order of Mr. Justice Kay cannot be sustained, and we discharge the same, and declare that the appellant is not bound to elect.

The proceedings in the present case have arisen out of the payment into court under the Trustee Relief Act of the £8,573, representing the legacy given to Mrs. Walker by her brother's will. In that matter she presented a petition, and she subsequently took out an originating summons for the decision of the question, and the trustees of the settlement have represented all parties contesting Mrs. Walker's claim. We direct the costs of Mrs. Walker to be paid out of the fund in court, and the costs of the trustees to be paid out of the £5,000 in which she is entitled to a present life interest.

NOTE. — See *In re Lord Chesham*, 31 Ch. D. 466 (1886).

BOOK XII.

JOINT OWNERSHIP.

CHAPTER I.

KINDS OF JOINT OWNERSHIP.

NOTE. — As grants and devises to two or more persons are now by Statute in most of the United States (see Stimson Am. Stat. Law, § 1371), as well as in England, held, in general, to create tenancies in common, it seems unnecessary to multiply cases on the question what words at common law created a tenancy in common.

Several sections from Littleton on Joint Ownership have been printed in the first volume of these Cases, pp. 429–432 ; some others are here added.

LIT. § 283. Also, there may be some jointenants, which may have a joint estate, and be jointenants for term of their lives, and yet have several inheritances. As if lands be given to two men and to the heirs of their two bodies begotten, in this case the donees have a joint estate for term of their two lives, and yet they have several inheritances ; for if one of the donees hath issue and die, the other which surviveth shall have the whole by the survivor for term of his life, and if he which surviveth hath also issue and die, then the issue of the one shall have the one moiety, and the issue of the other shall have the other moiety of the land, and they shall hold the land between them in common, and they are not jointenants, but are tenants in common. And the cause, why such donees in such case have a joint estate for term of their lives, is, for that at the beginning the lands were given to them two, which words without more saying make a joint estate to them for term of their lives. For if a man will let land to another by deed or without deed, not making mention what estate he shall have, and of this make livery of seisin, in this case the lessee hath an estate for term of his life ; and so inasmuch as the lands were given to them, they have a joint estate for term of their lives. And the reason why they shall have several inheritances is this, inasmuch as they cannot by any possibility have an heir between them engendered, as a man and woman may have, &c. the law will that their estate and inheritance be such as is reasonable, according to the form and effect of the words of the gift, and this is to the heirs which the one shall beget of his body by any of his wives, and to the heirs which the other shall beget of his body by any of his wives, &c. so as it behooveth

by necessity of reason, that they have several inheritances. And in this case if the issue of one of the donees after the death of the donees die, so that he hath no issue alive of his body begotten, then the donor or his heir may enter into the moiety as in his reversion, &c. although the other donee hath issue alive, &c. And the reason is, forasmuch as the inheritances be several, &c. the reversion of them in law is several, &c. and the survivor of the issue of the other shall hold no place to have the whole.

Lit. § 284. And as it is said of males, in the same manner it is where land is given to two females, and to the heirs of their two bodies engendered.

Lit. § 285. Also, if lands be given to two and to the heirs of one of them, this is a good jointure, and the one hath a freehold, and the other a fee simple. And if he which hath the fee dieth, he which hath the freehold shall have the entirety by survivor for term of his life. In the same manner it is, where tenements be given to two and the heirs of the body of one of them engendered, the one hath a freehold, and the other a fee tail, &c.

Lit. § 288. Also, it is commonly said, that every jointenant is seised of the land which he holdeth jointly *per my et per tout*; and this is as much to say, as he is seised by every parcel and by the whole, &c. and this is true, for in every parcel, and by every parcel and by all the lands and tenements, he is jointly seised with his companion.

Lit. § 291. Also, if a joint estate be made of land to a husband and wife and to a third person, in this case the husband and wife have in law in their right but the moiety, and the third person shall have as much as the husband and wife, viz. the other moiety, &c. And the cause is, for that the husband and wife are but one person in law, and are in like case as if an estate be made to two jointenants, where the one hath by force of the jointure the one moiety in law, and the other, the other moiety, &c. In the same manner it is where an estate is made to the husband and wife, and to two other men, in this case the husband and wife have but the third part, and the other two men the other two parts, &c. *causa qua supra*.[1]

Lit. § 298. Also if lands be given to two to have and to hold, *scil.* the one moiety to the one and to his heirs, and the other moiety to the other and to his heirs, they are tenants in common.

Lit. § 301. Also if a man let lands to two men for term of their lives, and the one grants all his estate of that which belongeth to him to another, then the other tenant for term of life, and he to whom the grant is made, are tenants in common during the time that both the lessees be alive.

And memorandum, that in all other such like cases, although it be not here expressly moved or specified, if they be in like reason, they are in the like law.

Lit. § 304. And, if three jointenants be, and the one release by his

[1] See 1 Prest. Est. 132; *Stuckey* v. *Keefe*, 26 Pa. 397 (1856).

deed to one of his companions all the right which he hath in the land, then hath he to whom the release is made, the third part of the lands by force of the said release, and he and his companion shall hold the other two parts in jointure. And as to the third part, which he hath by force of the release, he holdeth that third part with himself and his companion in common.

Co. Lit. 188 a. If a man make a feoffment in fee to the use of himself and of such wife as he should afterwards marry, for term of their lives, and after he taketh wife, they are jointenants, and yet they come to their estates at several times.[1]

[1] Cf. *Kenworthy* v. *Ward*, 11 Hare, 196 (1853); *M'Gregor* v. *M'Gregor*, 1 De G. F. & J. 63 (1859); *Hand* v. *North*, 10 Jur. N. S. 7 (1863); *Ruck* v. *Barwise*, 2 Dr. & Sm. 510 (1865).

CHAPTER II.

CONVEYANCE BY METES AND BOUNDS.

BARTLET *v.* HARLOW.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1815.

[*Reported* 12 *Mass.* 348.]

THIS was a petition for partition of a certain tract of land situate in Plympton in the county of Plymouth, of a moiety of which the petitioner alleges himself to be seised in fee, as tenant in common with the respondent: who pleads that he is sole seised of the premises, and traverses the tenancy in common of the petitioner, on which issue is joined.

At the trial of this issue, which was had before the late *Judge Dewey* at the sittings here after the last October Term, it appeared that the petitioner claimed under an extent of an execution duly issued in his favor against one Levi Harlow, by virtue of which the officer delivered to him seisin and possession of one moiety of the land described in the petition, being all the right of the said Levi Harlow therein. — And it was agreed by the parties, that at the time of the said extent, the said Levi and the respondent were seised as tenants in common, by equal moieties, of a tract of land containing about sixty acres: and that the said extent was on a part only of said sixty acres, describing it by metes and bounds, and dividing it from the residue.

A verdict was taken by consent for the petitioner, subject to the opinion of the court, whether an extent, so made on the estate of one tenant in common, of a part only of the tract of land holden in common, was valid. If the court should be of opinion that such an extent was valid, the verdict was to stand, and further proceedings to be had upon it: but if the court should be of a different opinion, the verdict was to be set aside, and a verdict entered for the respondent.

Eddy, for the petitioner.

Thomas and *Davis*, for the respondent.

JACKSON, J., delivered the opinion of the court.

By our Statute of Executions the creditor, if he thinks proper, may levy his execution on the real estate of his debtor, which shall be set off to him by metes and bounds; and if it is held in jointenancy, in coparcenary, or tenancy in common, the execution may be extended on the "real estate held as aforesaid, or part thereof, describing the same with as much precision as the nature and situation thereof will admit."

It is contended by the counsel for the petitioner, that the officer and the appraisers, in pursuance of this Statute, may set off all the debtor's interest and estate in a part of the land held in common; and that, although a levy on a part of his interest in the whole land would be good, yet they are not confined to this mode.

On the other side it is contended, that the Statute speaks of levying in such a case on *part of the estate*, and not on *part of the land;* and that any construction, contrary to the plain import of the words, would be highly injurious to the other co-tenants. — To this it may be added, that in the following section of the same Statute, it is said that "when the real estate extended upon cannot be divided and set out by metes and bounds as before described, or by the description before mentioned, then execution shall be extended upon the rents of such real estate;" making a plain distinction between the two modes of levying before mentioned, and showing that the description contemplated in case of a jointenancy, &c. was not a description of the lands by metes and bounds.

This view of the language used by the Legislature would lead us to adopt the construction of the respondent's counsel: and we are confirmed in this opinion by a more general view of the object of the Statute, and of the consequences that would result from a different construction.

The levy of an execution upon real estate is a kind of Statute conveyance from the debtor to the creditor. "It shall make as good a title to the creditor, his heirs and assigns, as the debtor had therein." (Section 2.) It was not the intention of the Legislature to allow estates to be created or transferred in any new manner, altogether repugnant to the principles of the common law: but to put a conveyance under this Statute on as good a footing as if made freely by the debtor. And it is generally true, that no estate or interest in land can be transferred by such a levy, which the debtor might not have conveyed, by any suitable instrument, for a valuable consideration.

We are then to consider whether Levi Harlow, the debtor, could have conveyed by deed to the petitioner, by metes and bounds, twenty acres, parcel of the sixty acres which he held in common with the respondent, so as to entitle the petitioner, to maintain a writ or petition for partition of the twenty acres against the respondent.

There is very little concerning this question to be found in the books. Among the numerous examples in Co. Lit. and other books, of the severance of a jointenancy, we find many instances of a conveyance by one jointenant of a part of his estate, but not one unequivocal case of a conveyance of his estate in a part of the land. There is indeed one in Co. Lit. 193, which may possibly be so understood. He says, "if two jointenants be of twenty acres, and one maketh a feoffment of his part in eighteen acres, the other cannot release" (viz. to his companion) "his entire part, but only in two acres; for that the jointure is severed for the residue." Lord Coke cites no case for this opinion;

so that we have no opportunity to ascertain by a recurrence to the facts, whether he contemplated a conveyance of the co-tenant's part in eighteen specific acres by metes and bounds, or in eighteen twentieths of the land. If the latter be understood, it will perfectly well comport with the context; and will illustrate the general doctrine for which the case is introduced, as well as if it be intended of a specific portion of land. And it is observable that Lord Coke uses like words in another place, where it is plain that he intends an undivided portion of the estate, and not a specific parcel of the land. He says, if two jointenants, or tenants in common are disseised, and one releases all his right in the moiety, he shall be barred of his right in the whole; "but if he releases all his right which he has in the one acre, this shall bar him of his moiety of that acre only: and yet the moiety of two acres is one acre." Here it is obvious that, if in the latter case we understand one acre described by metes and bounds, there is no analogy between the two cases; and the expression at the close, that "the moiety of two acres is one acre," is wholly misplaced and without meaning. Nor could it ever have been supposed, that a release of his right in one specific part would bar him of his right in the other part.

There is one other case on this point, which is transcribed by Viner from Brownlow's Reports, 157. A manor was conveyed, one moiety to one man in fee, and the other moiety to twelve others in fee. The twelve made a feoffment to J. S. of twelve several tenements and land: and J. S. made twelve several feoffments to those twelve. The thirteenth man, who had the other moiety, brought one writ of partition against them all, pretending that they held *insimul et pro indiviso*; and by the opinion of the whole court it would not lie: but he ought to have brought several writs. Brownlow in the place cited is stating several different points relative to the writ of partition, apparently taken from different cases which he had heard or read. He mentions no name nor date of the case in question, nor any other particulars, from which we might learn whether there was anything peculiar in the circumstances, or whether the point now in question was considered by the court. A single case, thus loosely reported, is entitled to very little consideration, when it appears to be in any degree inconsistent with the general principles of the law applicable to the subject.

On the other hand, it has been decided by this court, in the case of *Porter* v. *Hill*, 9 Mass. Rep. 34, that one jointenant cannot convey any specific part of the land to a stranger: at least not so as to prejudice his co-tenant. It is indeed intimated in that case, that such a conveyance may operate by way of estoppel against the grantor. But this would not aid the petitioner in the present state of the case now under consideration.

In 2 Co. 68, and Cro. Eliz. 803, it is laid down, as a general principle, that one jointenant cannot prejudice his companion, in estate, or as to any matter of inheritance or freehold: although as to the profits of the freehold, as the receipt of rent, &c. the acts of one may

prejudice the other. — But it would in many cases tend to the prejudice, and even to the destruction, of the interest of one co-tenant, if the other might convey to a stranger his moiety in several distinct parcels of the land. The owner of a moiety of a farm thus circumstanced, instead of one piece of land conveniently situated for cultivation, would on a partition be compelled to take perhaps ten or twenty different parcels interspersed over the whole tract, and separated by the parts allotted to the several grantees. Suppose that two men hold jointly, or in common, land in a town sufficient only for two house lots, and that one of them could convey to ten persons his share in as many different portions of the land; or that so many executions could be thus levied on his share: the other original co-tenant would, on a partition, be compelled to take ten different lots or parcels not adjoining to each other, and each too small for any useful purpose, instead of one house-lot, to which he was originally entitled, as against the grantor.

If it be said that this is a necessary incident to his estate, which he must be supposed to have contemplated when he took it; it may be more justly said in answer, that the restraint contended for, by which one is prevented from conveying distinct portions of the land, is a necessary incident to the estate; and that as each was originally entitled to one moiety, for quantity and quality, to be assigned to him by commissioners or by a jury in due course of law, neither of them shall by his own act, control the commissioners or jurors, and prevent their assigning to his companion such portion, and in such manner, as they, in the exercise of a sound discretion, would have thought just and proper. As the co-tenant had not originally any such right or authority in himself, to control the proceedings on a partition: so neither can he transfer such a right to any assignees or grantees of his share.

It may be added, that if one co-tenant has this right, the others of course have the same. Suppose then that three or more persons hold in common a township of wild land, and that each of them, without regard to the others, should divide the whole into such lots as he thought proper, and sell his share in each lot to different purchasers. As the lines of the lots, thus arbitrarily designated by the different owners, would perhaps in no instance coincide, it is easy to see that a partition among the several grantees would become extremely difficult and inconvenient: and if we imagine a like case, with a greater number of original owners, and consequently a greater diversity in the boundaries of the lots so conveyed, a partition would become perhaps utterly impossible.

Whilst the right of one co-tenant to alienate any distinct portion of the land might, as we have seen, be extremely injurious to his companion, the restraint on such alienations can seldom, if ever, prejudice the grantor. Suppose one of two co-tenants of forty acres wishes to sell ten acres, he may convey one undivided fourth part of the whole, and his grantee may by legal process have his share set off to him. This process of partition would be equally necessary, if the conveyance had

been of a moiety of twenty acres taken out of the forty. There is therefore no additional trouble or expense: and the only difference is, that the grantor is prevented from selecting any particular portion of the whole tract, out of which his grantee shall take his share: which is a right he could never claim or exercise in his own behalf, while he continued the owner of the whole moiety.

We are therefore satisfied that the petitioner cannot have partition, as prayed for in this case.

It does not however follow that the levy of his execution is wholly void and fruitless. If the respondent should ever have his moiety duly set off to him in severalty, and if the part so assigned to him should not include that which was taken on the execution of the petitioner, we see no reason why the latter may not then hold what has thus been taken on his execution, as there will be no person interested or authorized to question his title, excepting Levi Harlow; who would probably be estopped by the levy of the execution, as he would be by any other conveyance made by himself. Neither does it follow that the petitioner is not now entitled to a just proportion of the rents and profits of the lands, if they can be taken in such a manner as not to infringe the right of the respondent to his share, nor to disturb him in the enjoyment of an undivided moiety of the whole land. But as these points are not before us, it is unnecessary further to consider them.

The verdict returned in this case is to be set aside, and a verdict entered for the respondent, upon which judgment is to be rendered.[1]

VARNUM *v.* ABBOT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1815.

[*Reported* 12 *Mass.* 474.]

THIS was a writ of entry, in which the demandant counted upon a mortgage hereafter described. — The action was submitted to the determination of the court upon the following case agreed by the parties.

"On the 9th of March 1809, Eliphalet Fox, and Elizabeth his wife, were jointly seised of three undivided fourth parts of the demanded premises in fee, and Peter Fox, their son, was seised in common with them of the residue. And on the same day, Josiah W. Coburn, a creditor of the said Peter, attached upon mesne process, 'all his estate and interest in the tenements.'"

"On the 10th of April 1809, the said Eliphalet and Peter mortgaged about five acres, parcel of the tenements, to D. Abbot, one of the tenants, in fee."

[1] See *Adam* v. *Briggs Iron Co.*, 7 Cush. 361 (1851).

"On the 13th of July 1809, one Josiah Wood levied an execution, issued in his favor, against the said Peter Fox, upon the said Peter's undivided quarter in a part of the tenements, and had the same set off to him by metes and bounds."

"On the same day, and while the officer was upon the land, levying the said Wood's execution, the said Eliphalet and Peter executed to the demandant the deed declared on, which was acknowledged on the same day, and recorded the day following."

"On the 23d of September 1809, judgment was rendered for the said Josiah W. Coburn, in the action before mentioned, on which he took out his execution against the said Peter Fox, and on the 21st of October following levied the same upon all the said Peter's undivided quarter part of the tenements, except what had been before mortgaged to the said Abbot, and set off to the said Wood: and both the said executions were recorded within three months."

"The said Eliphalet Fox died on the 10th of August 1809, and the said Elizabeth survived him until the 7th of April 1812, and then died, leaving the said Peter Fox and the tenants Charles and Stephen R. Fox, with eight other children, her heirs-at-law."

"The tenants having *severally* pleaded the general issue as to several parts of the demanded premises, of which they are severally seised, and disclaimed as to the residue, it is agreed, that if the court shall be of opinion, upon the above facts, that the demandant is not entitled to recover against the tenants or either of them, he shall become nonsuit, and the tenants shall severally recover their costs against him. But if the court shall be of opinion that the demandant is entitled to recover against the tenants or either of them, such tenants shall be defaulted."

Hoar, for the demandant.

Stearns, for the tenants.

JACKSON, J. Since the argument of this cause, at the last term, we have had occasion to consider the general question which it involves, although presented in a different aspect, in the case of *Bartlet* v. *Harlow*, 12 Mass. 348, lately decided at Plymouth. In that case it was determined that a conveyance by one jointenant or tenant in common, of a part of the land by metes and bounds, to a stranger, whether the conveyance be by deed or by the levy of an execution, can have no legal effect or operation to the prejudice of a co-tenant. As the grantor himself has no right, on a partition, to select any particular portion of the land, and insist to have his moiety or any part of it set off in that specific portion, so he cannot convey such a right to his grantee.

We are now to consider whether such a conveyance has any effect as against the grantor, and those claiming under him. This point seems to have been left undecided in the case of *Porter* v. *Hill*, 9 Mass. Rep. 34, where it is intimated that such a conveyance may possibly operate to this effect by way of estoppel. The court also, in the case of *Bartlet* v. *Harlow*, avoided giving an express opinion on this point, it not being necessary in that case. On the fullest consideration we

are now satisfied that the conveyance may operate to this effect, without prejudice to the co-tenant, and without violating any principle of law. We see no difference in this respect between a conveyance by deed, and by the levy or extent of an execution. The former owner is estopped by the record of a judgment against him, and of the execution and return of it, as effectually as he would be by a deed under his own seal.

Suppose that after such a conveyance, the other co-tenant has his moiety set off to him on a petition, or writ of partition, and that his share is so assigned as not to include any part of what was so conveyed by his fellow: it is obvious that he can no longer object to this conveyance. He has got all that he was entitled to, and has not now any interest in the part so conveyed. There is then no one, who can dispute the title of the grantee, unless it be the former owner. But why should he be permitted to say, that nothing passed by his deed, or by the levy of the execution against him? He was in possession of the premises at the time of the conveyance, and he parted with that possession for a valuable and adequate consideration. There is no fraud, no oppression, nor injustice of any kind in the transaction, as it regards him. In the one case he receives a price agreed on by himself. In the other, the price is fixed by disinterested men under oath, with a right on his part to redeem within a limited time, if the appraised value is too low: which gives the effect of a voluntary bargain and sale by him. The only objection, which ever existed to the conveyance, arose from the injury it might do his co-tenant; but this objection is not competent for him to make. The law may allow the whole effect of this objection, without rendering the conveyance entirely void. Yet unless the conveyance is merely void, the grantor would, under these circumstances, be estopped to dispute its operation.

There are many cases, in which conveyances and other transactions are void and ineffectual to some purposes, or as they regard certain particular persons, which yet are valid and effectual in other respects. This is the case with fraudulent conveyances made to defeat creditors; and with conveyances of land not acknowledged and recorded pursuant to the Statute. It is therefore as unnecessary, as it would be unjust, that this rule of law, which is intended to prevent one co-tenant from making a conveyance to the prejudice of his fellow, should enable him to defraud a stranger, to whom he had conveyed for a valuable consideration, or a creditor, who had taken the land in discharge of his debt.

Instead of the case last put, let us suppose that, after such a conveyance by one co-tenant, the other should convey or release to the grantee his moiety in the same parcel of land. Each of the former owners would now be estopped by their respective deeds from disputing the title of the grantee. As to all strangers, his possession alone would be sufficient: and thus his title would in effect be indefeasible. Yet if the first conveyance were merely void, it could not help or fortify

the second, which would therefore be likewise void: and thus a party in actual possession, with a deed of conveyance from each of the two persons who alone had any pretence of title to the land, would still be unable to maintain the possession. So if one co-tenant of twenty acres should sell to a stranger his moiety in ten acres by metes and bounds, and afterwards to the same person the moiety of the remaining ten acres in like manner; if the first conveyance is void, the second will be also void. Yet in such a case there is no reason of justice or policy, which should prevent the grantee from holding an undivided moiety of the whole twenty acres.

Upon any other construction of such conveyances, great inconveniences would follow. Two or more jointenants or tenants in common could never convey any specific portion of the land, unless they joined in the same deed. But one may be willing to sell with general warranty, while another will give only a quitclaim. So each may be willing to warrant his specific share; but they may refuse to join in a deed with covenants of warranty, lest they should be mutually bound for each other. So if one of the part owners be absent and not known to exist, a case which has sometimes happened in the division of an intestate's estate among his heirs, it would be highly unjust and absurd that his return should wholly avoid such a conveyance made by the others in his absence. It is just that he should not be prejudiced by it. But there is no reason why the other co-tenants should, by this accident, be enabled to avoid their own contract, and to reclaim land which they had fairly sold for a valuable consideration.

It being then clear that a conveyance by one jointenant or tenant in common, of his share in a certain specific portion of the land, is not absolutely void; we are to see what is the effect of the several conveyances set forth in this statement of facts. And first, we may throw out of the case all the conveyances by Eliphalet Fox the father, whether of part or the whole. He was jointenant with his wife Elizabeth Fox, who survived him: and it has been decided in a case arising out of this same estate and title, that no conveyance by him could bind her after his decease, and that she took the whole by survivorship. The demandant therefore can hold nothing under Eliphalet Fox: and the three fourth parts, which belonged to him and his wife, descended on her death to her children and heirs. She left eleven children, two of whom, Charles and Stephen R. Fox, are sued as tenants in this action; and each of whom took one eleventh part of her three fourths, or three undivided forty-fourth parts of the whole. As it is said in the statement of facts that these tenants are severally seised of certain parts of the demanded premises, and they have respectively disclaimed as to the residue, we must suppose that there has been a partition among the heirs, upon which the several parts now defended by those two tenants were assigned to them respectively as heirs of their mother. In this view of the case, it is obvious that the demandant cannot recover against either of those two tenants.

As to the undivided fourth part formerly owned by Peter Fox, it appears that he had conveyed the whole of it, in different portions, by deeds and executions which have a priority to the demandant's title. Only one of these conveyances is now in question, viz. the mortgage made to Abbot: as the other two grantees, Wood and Coburn, are not sued in this action. According to the principles before mentioned, the mortgage made to Abbot of five acres, in April 1809, is good against Peter Fox, and all who claim under him. The demandant, who claims under a subsequent conveyance from the said Peter, is estopped to deny this title of Abbot: and the consequence is, according to the agreement of the parties, that he must become nonsuit.

We cannot here avoid remarking the irregularity of the proceedings in this suit. It appears that the three persons, who are here sued, hold, each of them in severalty, three different parcels of the premises. Two or more persons so situated cannot be joined as tenants in one writ of entry. The gist of every such action is the supposed unlawful entry of the tenant, or of the person under whom he claims: and the object of the suit is to disprove the title of the tenant, by showing its unlawful commencement. But the proof of an unlawful entry by one has no tendency, in the case supposed, to prove the same point as to another: their titles have no necessary connection: and it is, in effect, trying two or more distinct titles in one writ. So one of the tenants may be himself a disseisor; and the other may hold by alienation from a disseisor. But the demandant cannot have a writ against one as a disseisor, and against the other in the *per*. On the other hand, if a man is disseised by two or more persons, the disseisors have one joint estate, and one title; the entry of all of them is one act: and the disseisee must, in such a case, sue them all jointly. So if one disseisor conveys the whole to two or more jointly, they must all be sued together. But where two persons hold in severalty distinct parcels under conveyances from the same disseisor; or where they have themselves severally disseised the demandant of distinct parcels, it would be as irregular to join them in the suit, as to join two trespassers, who had each committed a trespass at different times, and on different portions of the plaintiff's land; or two debtors, who had each given his own bond to the plaintiff for different debts. The parties having however agreed that the demandant shall become nonsuit, if he is not entitled to recover against either of the tenants, this irregularity will not materially affect the result: as we are of opinion that he cannot recover against either.

Demandant nonsuit.

STARR *v.* LEAVITT.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1817.

[*Reported* 2 *Conn.* 243.]

THIS was an action of ejectment, to recover an undivided part of two pieces of land, bearing such proportion to the whole as 597.01 bears to 5069.94.

The case was as follows. The plaintiff claimed title by virtue of an execution in his favor, against Simeon Mitchell, on which the premises were set off. The first piece lay partly in Roxbury, and partly in Washington; and the second, wholly in Washington. They were owned in equal undivided moieties, by the debtor and his brother David Mitchell, during the life-time of the latter, as tenants in common, the titles by which they were held being distinct. On the death of David, the debtor became entitled, as heir-at-law, to one seventh part of David's interest, in addition to the moiety which he before owned. The debtor's interest in the second piece, however, was subject to the widow Susannah Mitchell's right of dower. The execution and cost amounted to 597 dollars, 1 cent. The land in Washington was appraised, by one set of appraisers, at 3452 dollars, 94 cents; that in Roxbury, subject to the encumbrance of dower, by another set of appraisers, at 1617 dollars; making in the whole 5069 dollars, 94 cents, the undivided half being 2534 dollars, 97 cents. The officer set off the land as follows: "I do, therefore, set off an undivided proportion and interest of the debtor in the above described land and buildings, in the proportion that 597 dollars, 1 cent, is to the aforesaid sum of 2534 dollars, 97 cents; and in the whole of said land before described, in the proportion that 597 dollars, 1 cent, is to the said sum of 5069 dollars, 94 cents; and the same is set off, subject to the aforesaid encumbrance of said widow's dower, to the creditor in said execution, in full satisfaction thereof, and of my fees thereon."

The defendant claimed title, by virtue of two executions against the same Simeon Mitchell, issued and levied *before* that of the plaintiff. One execution, with the cost, amounted to 138 dollars, 21 cents; which the officer levied on "the one equal half" of the second piece above mentioned. The certificate of the appraisers was as follows: "We, the subscribers, did appraise the above described undivided land to be worth to the creditor the sum of 138 dollars, 21 cents, in full satisfaction of this execution and costs." The land was set off, by the officer, thus: "I do hereby give the within named Samuel Leavitt, creditor, all the right and title to the above described undivided land, that I by law have a right to give, for his own proper use and benefit." The other execution, amounting, with the cost, to 435 dollars, 88 cents, was levied upon "the equal half of a piece of land lying in Washington,

as the property of the execution debtor, and containing 12 acres and 79 rods, lying in common and undivided with the heirs of David Mitchell, deceased;" being part of the second piece before mentioned, designated by metes and bounds, and appraised at the amount of the execution and cost. This land was set off in the same form as the other piece.

This case was reserved, by agreement of parties, for the consideration and advice of the nine judges.

Chapman and *Sherman*, for the plaintiff.

Benedict and *Bacon*, for the defendant.

SWIFT, C. J. The plaintiff and defendant both claim the land demanded, by the levy of executions upon it, as the estate of Simeon Mitchell; and questions arise respecting their validity.

The defendant has levied upon part of a piece of land, which Simeon owned as tenant in common with the heirs of David Mitchell; the same has been set off to him by metes and bounds; and he has taken the undivided moiety or right of Simeon to the part of the tract so described. This levy is void, according to the principles adopted by this court, in the case of *Hinman* v. *Leavenworth*, 2 Conn. 244 *n*. Simeon had no such estate as an undivided moiety or share in a part of the tract he owned as tenant in common: he had an undivided share in the whole tract; and the proper mode of levying the execution would have been, to spread it over the whole tract holden by Simeon as tenant in common, and to take such an undivided proportion, as would satisfy his debt. If the debt had been sufficient to take the whole share of Simeon, then the levying creditor would have been tenant in common with his co-tenant: if not, then he would have been tenant in common with the others in unequal shares, and a partition of the whole would have been made. But upon the present levy, partition must be made of part of the common right of Simeon with the other tenants; which cannot by law be done.

The plaintiff adopted the proper mode of levying his execution, but he has spread it over two distinct tracts of land holden by Simeon, as tenant in common with the heirs of David, by distinct titles, and has taken an undivided share of Simeon, in both pieces; but has not taken the whole of Simeon's right in either piece. He should have taken the whole of Simeon's right, in the tract on which he first levied, and then, if that had been insufficient to satisfy his execution, he might have levied on the other tract, and have taken sufficient to pay his debt. If the mode adopted by the plaintiff should be sanctioned, it would be in the power of a creditor to levy an execution upon any number of separate tracts of land, holden by a debtor as tenant in common, by distinct titles, and with different co-tenants, and take an undivided share of each, so as to become tenant in common with them all. This would be productive of great and unnecessary expense, and might embarrass the title as well as the occupation of the lands, and ought not to be permitted.

I am of opinion that the plaintiff is not entitled to recover.

In this opinion the other judges severally concurred, except EDMOND and GOULD, JJ., who gave no opinion, the former being related to one of the parties, and the latter having been of counsel in the cause.

Judgment to be given for the defendant.[1]

THOMPSON *v.* BARBER.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1842.

[*Reported* 12 *N. H.* 563.]

DEBT ON JUDGMENT. The parties agreed to submit the action to the decision of the court on the following statement of facts: At the October Term of the Court of Common Pleas for this county, A. D. 1840, judgment was recovered by the plaintiff against the defendant, for the sum of $197.46, debt, and costs, upon which judgment execution was issued, returnable at the April Term of said court, A. D. 1841. On the 4th day of November, A. D. 1840, the execution was duly levied upon real estate of the defendant, situated in Winchester, in the county of Cheshire. The defendant was tenant in common with four others, heirs of Barber, their father, in four separate parcels of land, all situated in Winchester. The land descended to said five heirs on the death of their father, and the defendant's interest in the land was attached soon after the decease of his father.

The officer extended the execution upon an undivided fifth part of two parcels of land only, the same being appraised at a sufficient sum to satisfy the execution. The plaintiffs being apprehensive that the levy of said execution was insufficient and invalid, for the reason that the same was not extended upon all the parcels of land in which the tenant had an interest, as aforesaid, and such portion of the defendant's interest in said four parcels of land, appraised and set off, as would have satisfied the execution, caused the present suit to be brought, founded upon the judgment.

And it was agreed, if the court should be of opinion that the levy of the execution is valid, judgment is to be rendered for the defendant, otherwise for the plaintiff.

Handerson, for the defendant.

Bennett, for the plaintiff.

UPHAM, J. Our Statute, directing the mode of extending and levying executions upon real estate, provides that when execution shall be extended upon any real or personal estate, and it shall afterwards appear that such estate, or some part thereof, did not, at the time of such extent or levy, belong to the debtor, then in every such case the creditor, or his executors or administrators, may commence and sustain

[1] Accord., *Butler* v. *Rays*, 25 Mich. 53 (1872). See *Peabody* v. *Minot*, 24 Pick. 329 (1834); *Green* v. *Arnold*, 11 R. I. 364 (1876).

an action of debt on the judgment upon which such execution issued, and recover the amount which may, for the reason aforesaid, remain equitably due, and unsatisfied. Laws N. H. 103.

This suit is brought under this provision of the Statute, from an apprehension that the levy made on land, in satisfaction of the judgment recovered against the defendant, is invalid. Whether the levy is so or not, depends on the respective rights and interests of tenants in coparcenary, and the mode in which their interests must be, or may be, partitioned among each other.

It is clear that the interest of a coparcener in land may be set off on execution, or any part of that interest. This cannot be done, however, so as to prejudice the other coparceners, or place them in any different position, or relation to their rights, than had previously existed. The power of the creditor under his execution can, of necessity, be no greater over the estate of the judgment debtor, than existed in such debtor. The mere circumstance that one coparcener is in debt, gives his creditor no greater or better claim, or right to enforce it over the other coparceners of land, than the debtor originally had. The common rights of the other coparceners remain unaffected by any such circumstance.

What, then, are the rights of co-tenants in coparcenary? When the co-tenancy exists merely in one tract of land, no difficulty would ordinarily arise in securing the interest of any co-tenant in the same, in behalf of his creditors. The difficulty is no greater, whether the interest extends through a variety of tracts of land within the State, except the greater labor of searching out and appraising such interest, or any portion of the entire interest as co-tenant in the several tracts; but this difficulty it is optional with the creditor to overcome, or not. It cannot be avoided.

It is clear, that where the interests of the coparceners extend to a variety of tracts of land throughout the State, no levy can be made by a creditor of any one coparcener that shall limit or restrict the rights of the other coparceners, in any of the privileges of partition, as provided by the Statute. Have the rights of the other coparceners, in this respect, been limited by this proceeding?

The Statute provides that when any person or persons, interested with others in any real estate, shall petition the judge of probate for the county where such estate, or the greater part of the same, is situated, to have his or their share in such estate divided, he shall cause partition to be made, by warrant directed to three or more freeholders, which, on being allowed and approved by the judge of probate, shall be binding on all parties; and when the estate is so situated that it cannot be divided so as to give to each party his equal share therein, without great prejudice or inconvenience, the same shall be assigned to one of the petitioning parties, they paying to the other petitioners, or owners, who by such means shall have less than their share, such sum or sums of money as the committee shall award. 1 Laws N. H. 344.

A similar mode of obtaining partition is provided by application to the Superior Court. In each of these Statutes very particular directions are given as to the notice to the co-tenants.

Such are the modes of partition pointed out by law; and yet the effect of this levy is to cause a partition, to the extent of the land taken, without notice of any description to either of the other co-tenants, and in a manner which might in other respects be greatly to their prejudice. On any other mode of partition the whole estate, consisting of various tracts of land, would be apportioned consistently with a due regard to the interests of the co-tenants in the entire property, and on a full hearing as to the whole subject-matter. By this levy a selection is made and a location fixed of the interest of one of the co-tenants in particular tracts, independent of any considerations as to the whole estate, or of the general interests of the other co-tenants; and the creditor might in this manner control and direct as to a partition and rights of the debtor in the estate, in a manner totally different from what the debtor could at any time legally have done. Such a doctrine would be entirely contrary to all principles governing the transfer of property by attachment and levy. The creditor, by such process, never acquires a right beyond that which originally existed in the debtor. The rights and title of other parties, so far as their interest is concerned, are never varied or abridged by such means.

The views here taken are fully sustained in numerous authorities. 10 Co., *Tooker's Case*, 68: Cro. Eliz. 803; 9 Mass. 34, *Porter* v. *Hill;* 12 Mass. 348, *Bartlett* v. *Harlow;* Ditto 474, *Varnum* v. *Abbott;* 14 Mass. 403, *Pond* v. *Pond;* 2 Pick. 443, *Cutting et al.* v. *Rockwood;* 24 Pick. 329, *Peabody et al.* v. *Minot et al.*

The levy must, therefore, be regarded as invalid against the other co-tenants, and there must be

Judgment for the plaintiff.

NOTE. — ACTIONS BY JOINT OWNERS AGAINST THIRD PERSONS. *In real actions.* (1) Joint-tenants and coparceners must join. Lit. §§ 311, 313. (2) Tenants in common must sever, Lit. § 311; unless they seek to recover something undivisible in its nature. Lit. § 314.

In ejectment. This action was based on a fictitious demise. If the demise was feigned to have been made by joint-tenants or coparceners jointly, the ejectment must be brought on the feigned demise; but if one of them is feigned to have demised his share separately, ejectment can be brought on the separate demise. *Roe* v. *Lonsdale*, 12 East, 39 (1810). On the other hand, any seemingly joint demise by tenants in common is really a demise of their separate estates, and therefore one ejectment cannot be brought on such demise as joint. *Mantle* v. *Wollington*, Cro. Jac. 166 (1607). *White* v. *Pickering*, 12 S. & R. 435 (1816). Contra, *Jackson* v. *Bradt*, 2 Caines' Rep. 169 (1804); *Den* d. *Bronson* v. *Paynter*, 4 Dev. & B. 393 (1839).

In personal actions all must join, because the injury is to the possession. Lit. § 315.

It may be observed that in an action for nuisance all the owners of the land on which the nuisance is alleged to exist must be joined as defendants. 1 Wms. Saund. 291 g.

In many of the United States, joint-tenants, coparceners, and tenants in common are now allowed by Statute to join or sever at their pleasure.

When one tenant in common in possession has been ejected by a stranger to the title, such tenant can recover the possession counting on his own seisin, and a disturbance of it; but when he has not been in possession, or otherwise counts on his title to an undivided share, he can recover against a stranger only that share. *Jackson* v. *Van Bergen*, 1 Johns. Cas. 101 (1799). *Dewey* v. *Brown*, 2 Pick. 387 (1824). *Dawson* v. *Mills*, 32 Pa. 302 (1858). *Gray* v. *Givens*, 26 Mo. 291 (1858).

It has, however, been held in some States that one tenant in common can recover possession of the whole property as against a stranger. *Barrett* v. *French*, 1 Conn. 354 (1815). *Phillips* v. *Medbury*, 7 Conn. 568 (1829). *Robinson* v. *Johnson*, 36 Vt. 69 (1863). *Lampsen* v. *Brander*, 28 Minn. 526 (1881). See Freem. Co-ten. §§ 343, 344.

When all joint owners must join in an action, it is generally conceded that they must all be competent in order to recover. (But see *Henry* v. *Means*, 2 Hill, S. C. 328 (1834).) The inference usually drawn from this doctrine is that if the Statute of Limitations has run against one of the plaintiffs, the suit is barred. This follows *Perry* v. *Jackson*, 4 T. R. 516 (1792). See *Marsteller* v. *M'Clean*, 7 Cranch, 156 (1812). But sometimes the opposite conclusion is drawn; viz., that if one of the plaintiffs is not barred, none of them are. *Lahiffe* v. *Smart*, 1 Bail. 192 (1829). See *Sanford* v. *Button*, 4 Day, 310 (1810); *Meese* v. *Keefe*, 10 Ohio, 362 (1841). Cf. *Shute* v. *Wade*, 5 Yerg. 1 (1833).

But where, under State Statutes, joint owners who need not join in fact do so, if one is barred, all are barred, even in those jurisdictions where, if the joining is compulsory, none are barred. *Sanford* v. *Button*, *ubi sup.* *Moore* v. *Armstrong*, 10 Ohio, 11 (1840). Freem. Co-ten. §§ 375–378.

CHAPTER III.

RIGHTS AND DUTIES OF JOINT OWNERS TOWARDS EACH OTHER.

SECTION I.

BUYING OUTSTANDING TITLES.

PALMER *v.* YOUNG.

CHANCERY. 1684.

[*Reported* 1 *Vern.* 276.]

ONE of the three that held a lease under a dean and chapter, surrenders the old lease and takes a new one to himself.

PER CUR. It shall be a trust for all.[1]

VAN HORNE *v.* FONDA.

NEW YORK COURT OF CHANCERY. 1821.

[*Reported* 5 *Johns. Ch.* 388.]

THE CHANCELLOR [KENT].[2] The bill seeks to call the defendant to an account, as executor of the estate of Jellis Fonda deceased, and, also, as executor of the estate of Henry V. Fonda deceased, and, generally, to make him account as trustee, acting for and on behalf of the plaintiffs, in the management and disposition of the estate, real and personal, of Henry V. Fonda.

The defendant admits himself to have been the acting executor of the estate of his father, Jellis F., and is ready to account for the personal estate, and the rents and profits of the real estate which he may have received. The great contest in the case is as to the character in which he acted, and the responsibilities which he has incurred, in respect to the estate, real and personal, of his brother Henry V. F.

1. He is charged with acting as executor of Henry, and that charge he denies. But it appears to be sufficiently supported by the testimony. One witness, Peter Fonda, says, that he took possession and disposed

[1] See *Hamilton* v. *Denny*, 1 Ball & B. 199 (1809).

[2] Only the opinion is here given.

of a great part of the personal estate of Henry V. F. and offered to sell to the witness several articles of farming utensils on the farm of Henry V. F., and the witness purchased a wood sleigh, and paid the defendant the price of it. So, it is in proof that he paid a debt due from Henry V. F., at his death, to John M'Carthy, and another debt due from Henry V. F. to Marks Dockstader; and in the last case, the debt was frequently demanded of him, and he was threatened to be sued for it. He received payment of a debt due from S. Kittle to Henry V. F.; and, in another case, he demanded, and received payment, of a debt due from M. B. Wemple to Henry V. F. These multiplied acts are decisive proof of his election to assume the trust and act as executor. They would have made him an executor *de son tort*, if he had not been named an executor in the will, and the same acts amount to an assumption of the office of a rightful executor.

I shall therefore consider all his acts, in relation to the estate of Henry V. F., as the acts of a person who was at the same time clothed with the office of executor.

2. The bill charges that the defendant received, in March, 1799, from the government of this State, 6,500 dollars, as a compensation for the extinguishment of the right derived from Jellis F. to 2000 acres of land in the Royal Grant, and that the plaintiffs are entitled to a moiety of that sum, with interest. The defendant admits that the sum received was 6,250 dollars, but he claims title to the whole of it; and contends, in the first place, that his father, Jellis F., was only entitled, in his lifetime, to 1000 acres, inasmuch as Brant Johnson, who sold him the 2000 acres, owned only a moiety of it and that the other moiety belonged to William Johnson, a brother of B. Johnson. He contends, in the second place, that his brother Henry, by his deed of the 3d of May, 1794, conveyed to him in fee, and absolutely, without any reservation or trust, his interest in the 1000 acres, for the consideration of 100 pounds, and which consideration was paid by a deed from the defendant to Henry, of the date of the 24th of April, 1794, of two lots in the Royal Grant, and containing the like consideration.

It is to be observed, as we proceed, that the defendant and his brother Henry were joint and equal residuary devisees of their father, Jellis Fonda.

There is reason to believe that the deed of the 24th of April was not given as the consideration of the deed of the 3d of May following. The want of concurrence in dates raises that presumption, especially as that want of concurrence is left without any explanation. In the next place, it is in proof, by the testimony of Simon Veeder, who took the acknowledgment of the deed of the 3d of May, and delivered the deed over to the defendant on the same day, that Henry observed, at the time, that *the deed to Jellis F. his father, was deficient.* The certificate of acknowledgment bears date the 31st day of May, 1794, but the certificate of acknowledgment of the prior deed of the 24th of April, bears date the 2d day of August, 1794, and both the acknowledgments were

made before the same judge. The defendant was present when the acknowledgment of the deed of the 3d of May was taken; and when the deed was handed to him, he observed that the consideration mentioned in the deed *was not the value* of the property, *but he took the deed in order to save something for the children of his brother, as his brother was pretty much involved in trouble.*

These observations of the parties made at the time of the execution of the deed, are evidence that the deed was not taken as an absolute purchase of the right of Henry to the 1000 acres; and they are evidence that it was taken *in trust*, and, probably, with a view to facilitate a compromise with the State, according to the charge in the bill. The testimony of Evert Yates and James Lansing shows that the deed of the 3d of May was not considered by the defendant as an absolute purchase of the right of Henry, and paid for, by the prior deed of the 24th of April. When the executors of Henry met, soon after his death, the defendant told John Fonda, who asserted Henry's interest in the money received upon the compromise, that Henry had no such interest, for his father's title was incomplete, and he had since purchased up the Indian title of William Johnson, and considered it a speculation of his own. Here was no suggestion that he had actually bought in the right of Henry, a reply that would naturally have suggested itself, if such had been the fact.

It is also admitted, by the answer, that the title of Jellis F. to the 2000 acres had been conveyed by him, in his lifetime, to Abraham G. Lansing; and that as the title proved partly defective, the defendant and his brother Henry, as the representatives of their father, had conveyed to Lansing, in 1793, other lands to the amount of 2650 acres, derived to them from their father, in lieu of the two thousand acres; and that Lansing had then released his right to the 2000 acres, to the defendant and Henry. The 2000 acres were thus received back into the funds of the estate, as a substitute for the 2650 acres which had been transferred; and the two brothers became equally entitled, as tenants in common and residuary devisees of Jellis F., to all the right and interest, in law and equity, of their ancestor to the 2000 acres. The defendant, afterwards, on the 29th of May, 1795, purchased of Moses Johnson, the heir of William Johnson, for 600 dollars, his right and title to 1000 acres, being part and parcel of the 2000 acres originally purchased by Jellis F. from Brant Johnson. The question, then, is, whether the defendant did not make that purchase for the joint benefit of himself and his brother Henry. If the deed of the 3d May, 1794, was given to the defendant in trust for the purpose of facilitating the acquisition of a good title, then the purchase from Moses Johnson was in trust for their joint benefit. The defendant has not interposed and pleaded the Statute of Frauds against setting up a trust by parol, in opposition to the deed of the 3d of May, 1794; and we are left at liberty to judge of the truth and effect of the parol proof. I am strongly inclined to believe that the deed was taken in trust, and that the subsequent

purchase from Moses Johnson was made in trust, and that Henry was equally interested in the settlement made with the State, in March, 1799; and that his representatives are entitled to a moiety of the payment received from the State (which payment amounted to 6,500 dollars), after allowing to the defendant, the payment he made to Moses J. and a just indemnity for his expenses in procuring the satisfaction from the State.

In some cases, says Littleton (sect. 307), a release to one joint tenant shall aid the joint tenant to whom it was not made, as well as him to whom it was made. I will not say, however, that one tenant in common may not, in any case, purchase in an outstanding title for his exclusive benefit. But when two devisees are in possession, under an imperfect title, derived from their common ancestor, there would seem, naturally and equitably, to arise an obligation between them, resulting from their joint claim and community of interests, that one of them should not affect the claim, to the prejudice of the other. It is like an expense laid out upon a common subject, by one of the owners, in which case all are entitled to the common benefit, on bearing a due proportion of the expense. It is not consistent with good faith, nor with the duty which the connection of the parties, as claimants of a common subject, created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim, which the relationship of the parties, as joint devisees, created. Community of interest produces a community of duty, and there is no real difference, on the ground of policy and justice, whether one co-tenant buys up an outstanding encumbrance, or an adverse title, to disseise and expel his co-tenant. It cannot be tolerated, when applied to a common subject, in which the parties had equal concern, and which created a mutual obligation to deal candidly and benevolently with each other, and to cause no harm to their joint interest. I have no doubt, therefore, that in a case like the present, and assuming what the evidence warrants us to assume, that the deed of May, 1794, was taken by the defendant for trust purposes, that the purchase from Moses Johnson ought, in equity, to inure for the common benefit, subject to an equal contribution to the expense.[1]

Henry, for the plaintiffs.

Van Vechten, for the defendant.

[1] The rest of the opinion is omitted.

KIRKPATRICK *v.* MATHIOT.

SUPREME COURT OF PENNSYLVANIA. 1842.

[*Reported* 4 *W. & S.* 251.]

ERROR to the Common Pleas of Westmoreland County.

David Kirkpatrick against Jacob D. Mathiot and Noah Mendall. This was an action of ejectment for the undivided fourth part of a tract of land: in which the parties stated the following facts, and considered them in the nature of a special verdict.

Previous to the 8th of January, 1801, John Probst was the owner of a full equal and undivided fourth part (the whole in four equal parts to be divided) of a certain furnace, called the Westmoreland furnace and forge, and of several tracts of land connected with the same, amounting altogether to 2998 acres, more or less, which undivided fourth part the plaintiff claimed title to recover in this action. On the 8th of January, 1801, John Probst executed a mortgage for the Westmoreland furnace property, including the lands in controversy, to John Kirkpatrick, to secure the payment of £1050. John Kirkpatrick sued out a *scire facias* upon the mortgage to March Term, 1807, of the Common Pleas of Westmoreland County, against the administrators of John Probst, deceased, the mortgagor, upon which judgment was rendered for the plaintiff, on the 26th of November, 1820, for the sum of $5744, with costs of suit. Whereupon *levari facias*, No. 111, of February Term, 1821, was issued, in virtue of which the mortgaged premises were struck down to David Kirkpatrick, the plaintiff of record in this action, on the 19th of February, 1821.

John Klingensmith, Esq., was sheriff of the county of Westmoreland at the time of the levy and sale, and the return was signed by him, having been commissioned on the 19th of November, 1819. John Klingensmith was commissioned as sheriff of Westmoreland County, a second time, on the 28th of October, 1828. On the 27th of August, 1829, John Klingensmith, sheriff, in pursuance of the proceedings heretofore referred to, executed a deed to the purchaser, David Kirkpatrick, for the land in controversy, and acknowledged it in open court on the 13th of August, 1830. No application for leave for the sheriff to execute the deed, nor any order of court relative thereto, could be found on record, and no such order existed, unless it could be inferred from the fact of the acknowledgment, which was regularly entered on the minutes of the court on the day it purported to have been taken. The above statement formed the plaintiff's claim of title.

Some time previous to the 3d of January, 1825, Alexander Johnson became vested with the title to one equal half part of one equal fourth part (the whole in four equal parts to be divided) of the Westmoreland furnace and forge, with the appurtenances, including the several tracts

of land, supposed to embrace 2998 acres, more or less, being the same land of which the plaintiff claimed title to the undivided fourth part, for which this ejectment was brought; and on the 3d of January, 1825, Alexander Johnson conveyed the same to James Cuddy. On the 26th of December, 1825, James Cuddy sold to Jacob D. Mathiot and Noah Mendall, the defendants, all the interest he had in the property in controversy, in virtue of the deed from Alexander Johnson, together with the half of an undivided fourth part of the same property as held by James Cuddy, under an article of agreement entered into between himself and M'Clurg & M'Knight, bearing date the 15th of June, 1825. Under this contract the defendants became entitled to an undivided fourth part (in four equal parts to be divided) of the property for which this action was brought.

The tract of land in controversy was purchased by the commissioners of Westmoreland County at a treasurer's sale of unseated land, on the 25th of June, 1822, for taxes assessed on the land as unseated, from the year 1808 up to the time of sale; and a deed was duly executed to them, pursuant to the Act of Assembly, by the county treasurer, on the 14th of February, 1823. Five years having elapsed without the property having been redeemed by the owners, the commissioners of Westmoreland County proceeded to sell the same pursuant to the Acts of Assembly in such case made and provided; and on the 25th of November, 1829, the property in controversy was struck down to Jacob D. Mathiot and Noah Mendall, the defendants, for the consideration of $30, and a deed duly executed and acknowledged by them to the purchasers. Before the commencement of this action, the plaintiff tendered to the defendants the proportion of the amount of the purchase money, the consideration of the commissioners' deed, which would be equivalent to the share to which he claimed title.

If, under this statement, the court should be of opinion that the plaintiff was entitled to recover, judgment was to be entered for him, with six cents damages and six cents costs; if otherwise, judgment to be entered for defendants.

The court below (*White*, *President*) rendered a judgment for defendants.

Findlay, for plaintiff in error.

Foster, contra.

The opinion of the court was delivered by

Huston, J. The decision of this case will depend on the construction of the following sections of the Act of 13th of March, 1815, and on the relations and duties of tenants in common to each other. The fifth section of the Act provides that if a sum shall not be bid for a tract of land offered at treasurer's sale, sufficient to cover the taxes and costs accrued at that time, "it shall be the duty of the commissioners of the proper county, or any of them, to bid off the same, and a deed shall thereupon be made by the treasurer to the commissioners for the time being, and to their successors in office, to and for the use

of the proper county; and it shall be the duty of the commissioners to provide a book, wherein shall be entered the name of the person as whose estate the same shall have been sold, the quantity of land, and the amount of taxes it was sold for; and every such tract shall not thereafter, so long as the same shall remain the property of the county, be charged in the duplicate of the proper collector; but for five years next following such sale, if it shall so long be unredeemed, the commissioners shall, in separate columns in the same book, charge every such tract of land with the reasonable county and road tax, according to the quality of said land, not exceeding in any case the sum of $6 for every hundred acres." By a subsequent Act of 13th of March, 1817, it was left discretionary with the commissioners whether they would purchase.

"Sect. VI. The right of redemption shall remain in the real owner for five years after such sale, on paying the treasurer of the county all the taxes and costs due thereon at the time of the sale, and interest therefor; and also the taxes assessed and interest thereon from the time it ought to have been paid, and on the production of the treasurer's receipt the commissioners shall, by deed poll indorsed on the back of the deed of the treasurer to them, convey to the person who shall have been the owner of the land at the time of the sale, or to his legal representatives, all the right and title which the county may have acquired under such sale as aforesaid;" the road tax to be paid to the supervisors of the proper township.

"Sect. VII. If the owner of such land shall not redeem the same within the period aforesaid, it shall thereafter be lawful for the commissioners to sell any such land by public sale, and make a deed therefor to the purchaser, which shall be available in law against the county as well as against the person or persons as whose estate the same had been sold; but no tract shall be sold for a sum less than the amount of taxes, cost, and interest which shall be due at the time of such sale by the commissioners," &c. And by Act of 20th of March, 1824, section second, it is enacted, that such deed made by the commissioners shall vest a good and valid title in fee-simple in the purchaser. And by the first section it is enacted, that the commissioners may sell lands so purchased for the best price that can be obtained for them. There is nothing in any of these Acts which in any degree gives color to the idea that after the five years have expired the former owner had any particle of interest in them, or in the proceeds of them.

Two cases decided in this court seem to settle all matters necessary to decide this cause. *Huston* v. *Foster*, 1 Watts, 477. The offer of the former owner to redeem after the five years had elapsed, did not avail him anything; and secondly, the sale by the commissioners after the five years was a sale by owners, and the purchaser was not bound to show anything but his deed. The other case is *Lewis* v. *Robinson*, 10 Watts, 354. Land held by two joint tenants was sold for taxes; after the time for redemption had gone by, one of those who had been a

tenant in common bought from the purchaser at sale for taxes. This court held that although if one tenant in common had redeemed the land within two years it might have enured to the use of the other; yet after the time for redemption had elapsed, and the title was valid in the purchaser, the relation of tenants in common ceased, and either might purchase and hold for himself. These decisions, or the last of them, were not published when this writ of error was taken.

Judgment affirmed.[1]

PAGE *v.* WEBSTER.

SUPREME COURT OF MICHIGAN. 1860.

[*Reported* 8 *Mich.* 263.]

QUESTIONS reserved from Montcalm Circuit in Chancery, where Canso Crane, one of the defendants, had interposed a demurrer to the bill of complaint, for multifariousness. The case is sufficiently stated in the opinion.

A. and *E. Gould*, for defendant Crane.

J. W. Longyear, for complainant.

MARTIN, C. J. This bill is filed for partition of real estate held by the complainants and defendants as tenants in common. As to Webster, who is described as being the owner of an undivided one-fourth, the bill is taken as confessed. Crane is represented as the owner of another undivided one-fourth, and the bill further alleges that he has a pretended title which he claims to hold as adverse to that of his co-tenants, but which is averred to be fraudulent and void; and they ask to have it so declared, in order that partition of the several interests of the owners may be made. The facts respecting this title are set out in the bill substantially as follows: The whole of the lands owned in common was sold at tax sales, for non-payment of taxes assessed thereon during the continuance of the tenancy in common; and upon such sales, the defendant Crane, being such co-tenant, bid off the same for the taxes of certain years, and for those of other years caused the land to be bid off by his brother, but for his own use, and, as the bill alleges, he took a transfer of the bids, and procured deeds from the Auditor-General to be executed therefor to himself. Reed, in his lifetime, offered to pay Crane his proportion of such bids, and the interest, &c., and the complainants, who are his executor and devisees, are still ready and now offer to do so; but they also insist that such sales were invalid for irregularities, and that Crane's title is a cloud upon theirs which ought to be removed.

This, Crane contends, is an assertion and admission of an adverse

[1] See *Dubois* v. *Campau*, 24 Mich. 360 (1872); *Alexander* v. *Sully*, 50 Iowa, 192 (1878).

title and claim in himself, which cannot be litigated in this suit; but that the validity of his title thus acquired should be first determined at law, and if found to be invalid, then this suit can be maintained.

It is unnecessary to determine whether, on a bill for partition between tenants in common, adverse titles or claims can be litigated and settled; because, if the allegations of this bill are true — and the demurrer admits their truth — Crane has no adverse title or claim. He occupies neither the position of one purchasing in an outstanding adverse title, nor of one purchasing from a *bona fide* purchaser at a tax sale, whose title had become absolute, whereby the co-tenancy had been dissolved. He stands simply as one who has paid upon compulsion taxes assessed against the property held by him in common with others.

The burden was cast upon him and his co-tenants to pay the taxes assessed against the land. This each might have discharged, so far as his own interest was concerned, by paying his aliquot proportion of the tax; and thus relieved such interest from the lien for the tax which the law imposed upon it. Had Crane done this, and afterwards bid in his co-tenants' interest sold for their default, perhaps a different rule might obtain, and he have acquired a good title as against them: but such is not this case, and no opinion is called for upon such a state of facts. But as they all neglected to discharge this burden, and as the coercive measure of a sale of the land was resorted to by the State to compel it, when Crane bid in, or procured another to bid in the land for him, and took the deeds to himself, he acquired thereby no title as against his co-tenants, as this was but another way of discharging such burden. He was in default himself; and his default, as well as that of the other co-tenants, occasioned the sale; and he cannot be permitted to take advantage of his own neglect of duty, to acquire the title of others. So far as this suit is concerned, therefore, he stands in the precise situation in which he would, had he voluntarily paid the whole amount of taxes before sale. He has no title, but simply a right to compel contribution from his co-tenants; and the bill is not multifarious for averring the facts, the character of the purchase, and his adverse claims founded upon it; nor for praying relief against them in aid of the partition. See *Lewis* v. *Robinson*, 10 Watts, 354; *Williams* v. *Gray*, 3 Greenl. 207; *Van Horne* v. *Fonda*, 5 Johns. Ch. 407.

Such being the rule, both of law and equity, complainants are entitled to the discovery sought; for if Crane's title be of the character charged in the bill, the court may and ought to declare it void and no impediment in the way of making partition between these parties. See *Overton* v. *Woolfolk*, 6 Dana, 374.

The interests of the several complainants are set forth with sufficient particularity. The Statute (Comp. L. § 4619) requires that the bill shall set forth the rights and titles of all persons interested in the land, so far as the same are known to the complainant. These complainants proceed jointly as the executor and devisees of Hezekiah H. Reed, for

a partition between the estate and these defendants. They ask no partition as between themselves. So far as the executor is concerned, he represents the whole title, and the devisees unite with him as interested in the subject-matter, and submitting to be bound by the decree. This they may do, as indeed may all representatives of a single interest. See Hill. on Real Property, 606.

The objection of the defendant Crane appears to be, that the interest of each complainant is not set out with sufficient particularity, and that the bill does not show in what proportions the complainants take under the will of Reed, nor in what manner Page has an interest in the land, nor how much that interest is. The bill avers that Hezekiah H. Reed, in his lifetime, was seised of the undivided one-half of the lands in question, and while so seised, died, leaving his last will and testament, whereby, among other things, Page was nominated his executor, and the land was devised in common to the other complainants, with the power nevertheless in such executor to sell and dispose of the same. There is no ambiguity in this statement of the interests of the several complainants, which, with the exception of that of Page, would necessarily be share and share alike; and Page's interest is stated with sufficient clearness as that of an executor with power to sell and dispose of the whole interest which the testator had in the land. I can perceive no necessity in any case for greater particularity; nor are we referred to any authorities or any principle of pleading requiring it. Sufficient is stated to enable the court to take the necessary proofs of the interests of the several parties, upon which to decree a partition; and especially in this case, where the complainants seek no partition as between themselves.

Let it be certified to the Circuit Court for the county of Montcalm, as the opinion of this court, that, upon the points reserved, the demurrer should be overruled.

The other justices concurred.[1]

ROTHWELL *v.* DEWEES.

SUPREME COURT OF THE UNITED STATES. 1862.

[*Reported* 2 *Black*, 613.]

APPEAL from the Circuit Court of the United States for the District of Columbia.

Mr. Bradley, of Washington City, for appellants.

Mr. Swan, of the District of Columbia, for defendants.

MR. JUSTICE MILLER. The appellees in this case, who were the defendants in the Circuit Court, hold the real estate, which is the

[1] See *Dubois* v. *Campau*, 24 Mich. 360 (1872).

subject of this controversy, by inheritance from their father, William Dewees. The title of Dewees was a deed from the Corporation of Washington City, made August 29th, 1836, on a sale for taxes. It seems to be admitted on all sides that this deed vested the legal title in Dewees, and that it is valid in his heirs, unless the plaintiffs shall be permitted to redeem from said sale, and have the deed set aside for reasons set forth by them in their bill.

The property in question was conveyed by Robert Morris, in 1796, to Joseph Ball and Standish Forde. Forde was then doing business in Philadelphia as a merchant, in partnership with one John Reed, and died about the year 1806 or 1807, leaving the mercantile firm insolvent. Shortly after Forde's death, Reed, the surviving partner, conveyed all the partnership property to William Paige, of Philadelphia, by deed of assignment for the benefit of creditors; and in the schedule attached to the instrument of assignment is included the property thus conveyed by Morris to Ball & Forde. This instrument is dated December 12th, 1807.

On the 18th of September, 1833, William Paige, as assignee of Reed, surviving partner of Reed & Forde, entered into a written agreement with William Dewees, the defendants' ancestor, in reference to this property; the substance of which is briefly this: —

Dewees was to take charge of the property, and redeem it from any tax sales which had already been made, and for which the time of redemption had not expired. He was to pay all future taxes, and all the expenses incident to sales of lots to be made by himself, for which he was furnished with a power of attorney by Paige. The money for all these taxes and expenses he was to advance, except a sum of about two or three hundred dollars, which was supposed to be in the hands of the Treasurer of Washington City, belonging to Reed & Forde, arising in some way out of sales for taxes already made. His compensation for all this was, that, after deducting his advances and interest from the proceeds of sales made by him, he was to have one-third of the remainder of such proceeds.

It appears that Dewees acted fairly under this arrangement for about three years; making advances to redeem the property where it had been sold for taxes, and paying the accruing taxes, until he had advanced about $900. He then, not having sold any of the property, nor realized anything from it in any other way, permitted it to be sold for taxes and bought it in himself, and took the corporation deed already mentioned of the 29th of August, 1836. He died on the 3d of September following. On the 10th of April, 1837, Paige, the assignee, by regular power of attorney, appointed Andrew Rothwell, one of the complainants, his agent, with authority to sell lots, to procure partition, and to make settlement with the heirs and representatives of Dewees. In 1841, Robert Smith was, by a decree of court, appointed assignee in place of Paige, who had died; and in 1846 said Smith quitclaimed, and released to Rothwell all the right, title, and interest which he had as such assignee,

in the property now in dispute. The complainant, Rothwell, also procured deeds of conveyance to himself and his co-plaintiffs, Naylor and Smith, from several persons describing themselves as heirs of Standish Forde, of their interest in the same property.

Rothwell Smith and Naylor then filed their bill in chancery against the defendants, one of whom is Rothwell's wife, praying to be permitted to pay the sum with interest which William Dewees had paid for his tax deed, and to have said deed set aside.

After the suit had progressed for some time, the other appellant, Robert S. Forde, filed a petition to be admitted as a party plaintiff, on the ground that he was a grandson and an heir-at-law of Standish Forde, and entitled to redeem for his share.

The court dismissed or overruled the petition of Robert S. Forde to be made a party, and, on final hearing, it dismissed the bill as to complainants, Naylor and Smith, and decreed that Rothwell, in his purchase from Robert H. Smith, the assignee of John Reed, should be held to be trustee for himself and wife, and the other defendants, heirs of Dewees; and that the defendants should make contribution to him, in payment of the sum so paid by him to Smith, and for taxes afterward paid by him on the property.

From this decree Robert S. Forde and the original complainants appeal.

The first question to be considered arises from the action of the court in dismissing Forde's petition. It is clear that if Forde had any title or interest in the property, it was a legal title, and no obstruction is seen to the assertion of that legal title against the defendants, in a court of law.

That court is the appropriate one to settle the conflict growing out of the legal title derived by Robert S. Forde from his ancestor, and the title claimed by defendants under the tax deed from the City of Washington. If he has any right to redeem from the sale for taxes, it must be a legal right, which he can exercise without the aid of a court of chancery. In his petition asking to be made a party, he claims that Dewees must be considered as the agent of Forde's heirs, as well as the agent of Reed's assignee, under his agreement with Paige. This claim, however, cannot be sustained. The partnership of Reed & Forde was insolvent. The assignment was made for the benefit of creditors, and the claim of the assignee to the lots in question was adverse to the claim of Forde's heirs. The assignee had thus claimed them for nearly thirty years, when Dewees became the agent of Paige. There can be no pretence then that Dewees was agent for Forde's heirs, or occupied towards them any relation of trust or confidence. No ground of equitable jurisdiction is perceived on which Robert S. Forde could assert his title in a court of chancery against the defendants, and his petition was properly overruled.

The next objection to the decree, namely, the dismissal of the bill as to complainants, Naylor and Smith, is based upon almost the same

ground as that just considered. These parties have conveyances from individuals, who describe themselves in the deeds as heirs of Standish Forde, and in addition to this the bill alleges that they were partners in the purchase made by Rothwell from the assignee of Reed. If it be admitted that the parties who made the conveyance to Naylor and Smith were the heirs of Standish Forde, it would not place those complainants in any other or better position than that of Robert S. Forde. But Naylor and Smith, being original plaintiffs, had an opportunity to prove their case at the final hearing, and failed to produce any evidence that their grantors were the heirs of Forde. It cannot be pretended that the recital of that fact in their deeds can be evidence against parties not claiming under them, and we have failed to discover any other evidence of it in the record.

Nor is there any evidence that these parties were interested in the purchase made by Rothwell from Smith, the assignee. If that fact, however, were established, we do not see that they could claim to occupy any better position than Rothwell, since they permitted him to take the conveyance to himself, without any mention of their rights in the purchase.

We come now to consider that portion of the decree which concerns Rothwell and the defendants. This must be supported, if at all, upon the two-fold operation of the principle that a purchase of an outstanding title or interest in property, by a person sustaining certain relations to others interested in the same property, should, at the option of the latter, enure to their benefit; the application being in this case made, first, to the purchase of the tax title by Dewees, agent for Paige, the assignee; and, secondly, to the purchase made by Rothwell from the assignee, he being the husband of one of the tenants in common who held the property as heirs of Dewees.

So far as the tax title acquired by Dewees is concerned, there can be no doubt that the principle is correctly applied. As the agent of Paige, it was his duty to pay these taxes, and to prevent the sale of the lots. In violation of this duty he permitted the lots to be sold, and himself became the purchaser. Besides his general duty as agent, he had expressly covenanted, in writing, that he would, out of his own funds, advance the money and pay these taxes. There is nothing in law or morality plainer than that his purchase must be held to be in trust for the benefit of his principal, on repayment of the sum advanced by him. 1 Story, Eq. §§ 315, 1211, 1211 *a*; Story on Agency, §§ 210, 211; 8 Vesey R. 337. The defendants, who are his heirs, can stand in no better condition than he would if he were alive.

In regard to the application of the principle to the purchase of Rothwell from Smith, the successor of Page in the assignment, it is claimed by defendants, that Rothwell is to be treated as having a common interest with them in the title derived from Dewees, and that his purchase of the outstanding equity of Reed's assignee must inure to the common benefit of the co-tenants of that title.

In the case of *Van Horne* v. *Fonda*, 5 Johns. Chy. R. 407, the rule is very fully laid down by Chancellor Kent, that where two devisees or tenants in common hold under an imperfect title, and one of them buys in the outstanding title, such purchase will inure to their common benefit upon contribution made to repay the purchase-money. The same point is also decided in *Farmer and Arnold* v. *Samuels et al.*, 4 Littell R. 187. The soundness of the principle is not denied by counsel for plaintiff, as applicable to persons strictly tenants in common, or joint tenants, or others having an equality of interest or estate; but it is said that the complainant in this case is not tenant in common, but that his interest is at most only tenant by the curtesy of his wife's interest, and that even that is doubtful; and that there is no equality of interest as between him and the defendants. In this connection much stress is laid by counsel upon the language of the court in *Van Horne* v. *Fonda*, to the effect that in that case there was an equality of estate between the co-devisees. It does not appear to us, however, that any particular force was given to that fact by the learned judge, but rather that the rule was based on a community of interest in a common title, which created such a relation of trust and confidence between the parties that it would be inequitable to permit one of them to do anything to the prejudice of the other, in reference to the property so situated. It seems to us that the true reason of the rule applies as forcibly to the husband of a tenant in common, as to one of the immediate co-tenants. This seems also to have been the opinion of the Court of Appeals of Kentucky in the case of *Lee and Graham* v. *Fox*, 6 Dana's R. 176. It was decided in that case that the husband of a co-heiress, who had purchased an outstanding encumbrance on the lands of the heirs, should be held to have purchased for the benefit of all the tenants, upon condition only that they should contribute their respective proportion of the consideration actually paid for the encumbrance.

We are quite satisfied with this as a rule of equity, sustained as it is by authority and sound principles of morality; and as the decree of the Circuit Court was in conformity to it, it must be affirmed.

ROBERTS *v.* THORN.

SUPREME COURT OF TEXAS. 1860.

[*Reported* 25 *Tex.* 728.]

APPEAL from Nacogdoches. Tried below before the *Hon. A. W. O. Hicks.*

This suit was instituted by Felix G. and Noel G. Roberts, executors of the will of Elisha Roberts, deceased, against the administrator and heirs of Frost Thorn, deceased. The petition of the plaintiffs alleged that on or about the 24th day of September, 1834, one Adol-

plus Sterne claimed to own the Cordova grant of land, in Nacogdoches County, containing about three and a half leagues of land, on which day he sold and conveyed to Frost Thorn, in his lifetime, one undivided half of said grant; that about the 7th day of January, 1835, said Sterne sold and conveyed the remaining undivided one-half thereof to Philip A. Sublett; that on or about the 17th day of January, 1838, said Sublett sold and conveyed to Elisha Roberts, plaintiffs' testator, two-thirds of his aforesaid interest of one-half; and that the said Elisha Roberts retained his aforesaid interest during his life, and which, plaintiffs claim, yet belongs to his estate.

The petition further alleges that on or about the —— day of ——, the title under which said Frost Thorn and petitioners, as executors, held said land, became exceedingly questionable; a great portion of the land having been located upon by others; that said Thorn had sold some portion of it, not leaving more than one league worth filing a certificate upon, which lay in two parcels, one-half of a league, or thereabouts, lying in the southeast corner of said tract, and the other half league, or thereabouts, lying for northern boundary on the north line of said tract, between the northeast and northwest corners of said surveys. That the title to said Cordova grant, as derived through said Sterne, has never yet been adjudicated, but is still considered questionable and doubtful. That these two tracts or parcels of land were, on or about the —— day of ——, by said Frost Thorn located upon in his own name, by virtue whereof patents have issued therefor to him in his individual name, from the general land office.

The petition asserts that the file, location and patents inure to the benefit of petitioners as executors, as well as to said Thorn, in proportion to their respective interests derived through said Sterne. Plaintiffs aver that they would gladly have joined said Thorn in re-locating said tracts, and have paid their proportion in carrying such location into a patent, but had no notice or intimation of the intention of said Thorn to make said re-location. They aver that the value of the land certificate located as aforesaid by said Thorn, did not exceed $500, and that the other expenses incident to said location of patents did not exceed $——, two-thirds of one-half whereof they offer to pay to the legal representatives of said Frost Thorn, deceased. By amended petition they allege further, that before the location and patenting aforesaid, one Bailey, being a tenant on said land, was sued by said Thorn, of the pendency whereof he gave to plaintiffs' testator notice, and requested him to furnish counsel to assist in the prosecution of it, and that said testator, and after his death the plaintiffs as executors, complied with the aforesaid request. Thereupon, they further say said Thorn abandoned and dismissed said suit, and immediately located and filed the certificates upon the land, without notifying plaintiffs or their testator of any such intention as before stated.

The petition prayed that two-thirds of the undivided half of said two parcels of land so located by and patented to the said Frost Thorn,

deceased, be decreed to the heirs and legal representatives of said Elisha Roberts on payment by them of their proportionate rate of cost and expense aforesaid incurred by said Thorn to obtain said patents; the amount thereof to be ascertained on the trial of the cause. The plaintiffs prayed also for partition of the respective interests in said land.

The defendants filed a general exception to the petition, which was by the court sustained, and judgment rendered accordingly against the plaintiffs. The plaintiffs assign for error the court's ruling above stated.

H. C. Wallace, for the appellants.

G. F. Moore, for the appellees.

WHEELER, C. J. The question to be determined is whether, upon the case stated in the petition, the appropriation of the land in question by Thorn as vacant land inured to the benefit of the plaintiff's testator? In *Van Horne* v. *Fonda*, 5 Johns. Ch. R. 388, Chancellor Kent decided that one of two devisees could not purchase an encumbrance on their joint estate and use it to sell the land, and to strip the other of his property. The Chancellor said: "I will not say that one tenant in common may not, in any case, purchase in an outstanding title for his exclusive benefit. But when two devisees are in possession under an imperfect title, derived from their common ancestor, there would seem naturally and equitably to arise an obligation between them, resulting from their joint claim and community of interests, that one of them should not affect the claim to the prejudice of the other. It is like an expense laid out upon a common subject, by one of the owners, in which case all are entitled to the common benefit on bearing a due proportion of the expense. It is not consistent with good faith, nor with the duty which the connection of the parties, as claimants of a common subject, created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim, which the relationship of the parties, as joint devisees, created." (Ib. 407.)

In accordance with these views, it seems to be well settled, that joint tenants and co-parceners stand in such confidential relations in regard to one another's interest, that one of them is not permitted in equity to acquire an interest in the property hostile to that of the other; and, therefore, a purchase, by a joint tenant or co-parcener, of an encumbrance on the joint estate, or an outstanding title to it, is held, at the election of his co-tenants within a reasonable time, to inure to the equal benefit of all the tenants upon condition that they will contribute their respective ratios of the consideration actually given. The same equity has been considered as subsisting between tenants in com-

mon, where they hold under the same instrument. And where two tenants in common, who had heard of an adverse title, and agreed to join in defending against it, or in purchasing it, it was decided that one of them who purchased the adverse title for a small sum, must hold it in trust for the other, upon that other paying his proportion of the purchase-money. (Cited in *Smiley* v. *Dixon*, 1 Penn. 441.) But it is said in the notes to the leading case of *Reich* v. *Sanford*, upon a review of the authorities, that "tenants in common probably are subject to this mutual obligation, only where their interest accrues under the same instrument, or act of the parties or of the law, or where they have entered into some engagement or understanding with one another; for persons acquiring unconnected interests in the same subject, by distinct purchases, though it may be under the same title, are probably not bound to any greater protection of one another's interests, than would be required among strangers." 1 L. Cases in Eq. 74, 75; *Matthews* v. *Bliss*, 22 Pick. 48. This is believed to be a proper qualification of the doctrine as applied to tenants in common; and applied to the present case, it cannot, we think, be held that the title acquired by Thorn inured to the benefit of plaintiff's testator. Their interests did not accrue under the same instrument, but they purchased at different times, by different instruments; and there is no averment of any agreement between them respecting the title. It is averred that the defendant's testator had brought suit to recover the possession, and gave notice to the plaintiff's testator of the pendency of the suit, and requested him to furnish counsel to assist in the prosecution of it, which he did. This can scarcely be said to be a sufficient allegation of an agreement between the parties to unite in defending and upholding the title. It is the statement of evidence tending to the proof of such an agreement rather than of the agreement itself. It is to be observed that it is not averred that Thorn was ever in possession, or that he had any superior knowledge or means of information respecting the state of the title, or that he made use of his co-tenancy to obtain an advantage. The only complaint is, that he located the land and obtained the title from the government without giving notice to his co-tenant. But so far as appears, his co-tenant had equal knowledge and opportunity to secure the land for himself, if he saw proper. It appears by the petition that others, as well as Thorn, were aware of the condition of the title, and had already located a considerable portion of the land.

This brings me to notice another aspect of the case which, to my own mind, is decisive. It is not averred that the supposed title purchased of Sterne was of any value; and I think it may be inferred from the petition that it was worthless, and the land in fact vacant. If such was the case, the parties acquired nothing by their purchase, and consequently had no title or estate to create a tenancy in common. The doctrine we are considering applies where there is a community of interest in a defective title, or a superior outstanding title or encum-

brance. If the inference I deduce from the statements of the petition be correct, this is not the case of a defective title, but of a want of title. In such a case, in Pennsylvania, where two persons had purchased from a third who was supposed to have a title, but who, it was afterwards ascertained, had none, the Supreme Court held that there was nothing in the supposed co-tenancy to prevent one of the parties from appropriating the land for his own exclusive benefit. *Smiley* v. *Dixon*, 1 Penn. R. 441. The parties took nothing by their purchase; they were not joint tenants or tenants in common, and there was no privity between them. The court recognized the doctrine which forbids one tenant to do anything to the prejudice of his co-tenant in its full extent, but denied its application to such a case; observing that there was no privity, no confidence between the parties, and nothing done by the one to induce the other to purchase, or to confide in their purchase. The land was vacant, to be taken by the first occupant; and there existed no obligation between the parties to prevent its appropriation by one of them. These observations apply in their full force to the present case in my view of it. There was no privity between the parties; they acquired nothing by their purchase; and there was no relation of confidence or community of interest to prevent the appropriation of the land by one of them. I mention this view of the case only as the one which is most satisfactory to my mind.

We are of opinion that there is no error in the judgment, and that it be affirmed.

Judgment affirmed.[1]

CONN *v.* CONN.

SUPREME COURT OF IOWA. 1882.

[*Reported* 58 *Iowa*, 747.]

ACTION for partition of real estate. There was a reference, and upon the coming in of the report the same was confirmed. From the judgment the intervenor appeals.

H. C. Hemenway, for appellant.

No appearance for appellee.

SEEVERS, C. J. The undisputed facts are, that in 1866 Robert Conn died intestate, seised of eighty acres of land. He left surviving him a widow, who intermarried with defendant Eggleston. He also left surviving him four children, one of whom is the plaintiff, two are defendants, and one died without issue prior to the commencement of this action.

In 1876 the widow of deceased and her husband Eggleston executed a mortgage upon said premises to the defendant Faunce, which has been foreclosed, and the premises sold and conveyed by the sheriff to

[1] See *Davis* v. *Givens*, 71 Mo. 94 (1879).

said Faunce. In 1875 said real estate was purchased by one Craig at delinquent tax sale, who paid certain subsequent taxes and conveyed his interest to Faunce, to whom the premises were conveyed by the county treasurer, and afterwards Faunce conveyed the premises by quitclaim deed to the intervenor. The referee found that the widow of Robert Conn and her children resided upon and occupied said premises as their homestead until 1878, when the widow abandoned the same, leaving said children residing thereon, and that prior to the execution of the mortgage the widow had elected to take the homestead for life.

The questions presented by counsel are: —

I. Whether the widow can take of the real estate owned by her husband, both her distributive share or dower, as it was designated when Robert Conn died, and the homestead for and during her life. It has been more than once held that she may take either, but not both. *Myer* v. *Myer*, 23 Iowa, 359; *Butterfield* v. *Wicks*, 44 Id. 310.

II. Is there in the case at bar sufficient evidence the widow elected to take the homestead? In *Butterfield* v. *Wicks*, it was said: "The occupancy of the property . . . as a homestead may well be regarded as an election to hold it as a homestead and not a part of it merely as dower." That the occupancy of the homestead at some period of time should be regarded as sufficient evidence of an election to take it for life in preference to dower or a distributive share must, we think, be true. The only thing which tends to evince the occupancy of the homestead should not be regarded as an election is the execution of the mortgage, but this was not executed until more than ten years after the death of Robert Conn. During all that time the premises were occupied by the widow as a homestead, and no claim was made to have her claim admeasured. She must be presumed to have known she could not have both dower and occupy the premises as a homestead. We think her occupancy of the homestead for more than ten years should be regarded as an election to take it for life. Actions for the recovery of real estate are barred at ten years, and such period is sufficient evidence of an election to take the homestead instead of a distributive share.

III. The next question is as to the right of the heirs to redeem from the tax sale. As to two of them, the right is conceded on the ground of minority. The right of one of the heirs, as we understand, to redeem, is contested. The evidence is not all before us, but Faunce acquired title under the mortgage foreclosure in July, 1878. When Faunce acquired the interest of the purchaser at the tax sale, we are unable to say, as such fact was not found by the referee, and the evidence showing such fact has been omitted. As one of the children of Robert Conn died without issue prior to the execution of the mortgage, the latter became a lien upon the share of Mrs. Eggleston which she inherited from such deceased child. Upon the foreclosure of the mortgage and sale thereunder, such interest became vested in Faunce. In the absence of the evidence we must presume Faunce acquired the in-

terest of the purchaser at the tax sale after he became vested with the title to the share of the deceased child. Faunce then was a tenant in common with the other heirs of Robert Conn, and it is believed to be well settled that one tenant in common cannot acquire a tax title to the prejudice of his co-tenants. *Weare* v. *Van Meter*, 42 Iowa, 128; *Fullon* v. *Chidester*, 46 Id. 588. The intervenor has no better right than Faunce because he holds under a quitclaim deed. The intervenor therefore cannot complain of the action of the court holding there could be redemption.

It is insisted the intervenor was entitled to rents and profits after his right as a tenant in common was denied. We fail to find the referee made any finding upon this subject, and as the exceptions to his report are not set out in the abstract, we are unable to say this matter was brought to the attention of the Circuit Court.

The referee found the amount required to redeem, and allowed six per cent interest thereon from the time the several amounts were paid. It is insisted the interest should have been ten per cent. In this we do not concur.

Affirmed.[1]

SECTION II.

LIABILITY FOR USE, MISUSE, AND REPAIRS.

Lit. § 322. Also, in the case aforesaid, as if two have an estate in common for term of years, &c., the one occupy all, and put the other out of possession and occupation, he which is put out of occupation shall have against the other a writ of *ejectione firmæ* of the moiety, &c.

Lit. § 323. In the same manner it is where two hold the wardship of lands or tenements during the nonage of an infant, if the one oust the other of his possession, he which is ousted shall have a writ of *ejectment de gard* of the moiety, &c., because that these things are chattels reals, and may be apportioned and severed, &c., but no action of trespass (*videlicet*) *Quare clausum suum fregit, et herbam suam, &c. conculcavit, et consumpsit, &c., et hujusmodi actiones, &c.*, the one cannot have against the other, for that each of them may enter and occupy in common, &c., *per my et per tout*, the lands and tenements which they hold in common. But if two be possessed of chattels personals in common by divers titles, as of a horse, an ox, or a cow, &c., if the one take the whole to himself out of the possession of the other, the other hath no other remedy but to take this from him who hath done to him the wrong to occupy in common, &c., when he can see his time, &c. In the same manner it is of chattels reals, which cannot be severed, as in the case aforesaid, where two be possessed of the

[1] See *Bracken* v. *Cooper*, 80 Ill. 221 (1875); *Montague* v. *Selb*, 106 Ill. 49 (1883).

wardship of the body of an infant within age, if the one taketh the infant out of the possession of the other, the other hath no remedy by an action by the law, but to take the infant out of the possession of the other when he sees his time.

Co. Lit. 200 b. If two tenants in common or jointenants be of an house or mill, and it fall in decay, and the one is willing to repair the same and the other will not, he that is willing shall have a writ *de reparatione faciendâ;* and the writ saith, *ad reparationem et sustentationem ejusdem domus teneantur;* whereby it appeareth, that owners are in that case bound *pro bono publico* to maintain houses and mills which are for habitation and use of men.

If one jointenant or tenant in common of land maketh his companion his bailiff of his part, he shall have an action of account against him, as hath been said. But although one tenant in common or jointenant without being made bailiff take the whole profits, no action of account lieth against him; for in an action of account he must charge him either as a guardian, bailiff, or receiver, as hath been said before, which he cannot do in this case, unless his companion constitute him his bailiff. And therefore all those books which affirm that an action of account lieth by one tenant in common, or jointenant, against another, must be intended when the one maketh the other his bailiff, for otherwise never his bailiff to render an account is a good plea.

St. 4 & 5 Anne, c. 16, § 27. And be it enacted by the authority aforesaid, That from and after the said first day of Trinity Term, actions of account shall and may be brought and maintained against the executors and administrators of every guardian, bailiff, and receiver; and also by one joint tenant, and tenant in common, his executors and administrators, against the other, as bailiff for receiving more than comes to his just share or proportion, and against the executor and administrator of such joint tenant, or tenant in common; and the auditors appointed by the court, where such actions shall be depending, shall be, and are hereby empowered to administer an oath, and examine the parties touching the matters in question, and for their pains and trouble in auditing and taking such account, have such allowance as the court shall adjudge to be reasonable, to be paid by the party on whose side the balance of the account shall appear to be.

MARTYN *v.* KNOWLLYS.

King's Bench. 1799.

[*Reported* 8 *T. R.* 145.]

This was an action on the case in the nature of waste. The declaration stated that the plaintiff was seised in his demesne of and in an undivided part of certain lands, &c. in Wingfield, Berkshire, the whole of which were in the occupation of the defendant, who held and enjoyed the plaintiff's part as tenant to him (the plaintiff), yet that he (the defendant) wrongfully ploughed up, &c. divers acres of meadow, &c. and wrongfully felled and destroyed divers timber and other trees, &c. There were other counts, not stating that the defendant held the plaintiff's part as tenant to the plaintiff. The defendant pleaded the general issue.

On the trial at the last Berkshire Assizes before *Mr. J. Heath*, it appeared that the plaintiff and defendant were tenants in common of the land on which the trees grew; that the defendant occupied the whole, having a demise from the plaintiff of his moiety; and that he had felled many trees, all of which were of a proper age for being cut.

The learned judge directed a verdict to be taken for the plaintiff for the value of half the trees, giving the defendant leave to move to set it aside and to enter a verdict for him, if this court should be of opinion that the action could not be maintained.

This point was now discussed here on a motion to enter a verdict for the defendant, and the above cases were again referred to; and after argument the rule was made absolute.

Lord Kenyon, C. J., said, This verdict has neither principle nor authority for its support. The defendant cannot be in a worse situation by being tenant to the plaintiff of his moiety than he would have been in if the plaintiff had not demised to him; and considered in that point of view, this action cannot be supported. This is an action *ex delicto*. If one tenant in common misuse that which he has in common with another, he is answerable to the other in an action as for misfeasance. But here it does not appear that the defendant committed anything like waste: no injury was done to the inheritance; no timber was improperly felled; the defendant only cut those trees that were fit to be cut. And if he were liable in such an action as this, it would have the effect of enabling one tenant in common to prevent the others taking the fair profits of their estate. In another form of action the plaintiff will be entitled to recover a moiety of the value of the trees that were cut.

Rule absolute to enter a verdict for the defendant.

Erskine and *Manly*, for the plaintiff.

Milles and *Abbott*, for the defendant.

WILKINSON *v.* HAYGARTH.

QUEEN'S BENCH. 1847.

[*Reported* 12 *Q. B.* 837.]

TRESPASS. The declaration charged that defendant, heretofore, to wit on 1st January, 1840, and on divers other days &c. between &c., with force and arms &c., broke and entered a certain close of plaintiff, called &c., situate &c., "and then dug up, tore up, subverted, damaged and spoiled the earth and soil of the said close, and made divers large pits, holes, and excavations therein, and kept and continued the same so there made for a long time, to wit from thence hitherto, and also then cut, dug up, and removed divers large quantities, to wit 1000 cart loads of turf, 1000 loads of peat, and 1000 cart loads of the soil, of the plaintiff, of the value" &c., "then respectively growing and being in the said close; and then seised, took, and carried away the said turf, peat, and soil, and converted and disposed of the same to his own use; and other wrongs" &c., against the peace &c.

Pleas. 1. Not guilty. Issue thereon.

2. That the said close, soil, peat, and turf were not, nor was any or either of them, or any part thereof, at the said times when &c., or at any or either of them, the soil, &c. of plaintiff, in manner and form &c.: conclusion to the country. Issue thereon.

3. That the said close in which &c. now is, and at the several times when &c. was, the close, soil, and freehold of Henry Thompson, Thomas Wearing, Ann Hodgson, Abraham Holme, George Guy, and Edward Alderson, and divers other persons whose names are to defendant unknown, respectively, as tenants in common thereof; and that defendant, at the said times when &c. by the leave and license of the said H. Thompson &c.: justifying the trespasses in the declaration under license from H. T.: verification. Replication: That defendant of his own wrong, and without the leave and license of H. Thompson, committed &c.: conclusion to the country. Issue thereon.

4. A similar plea, except that the justification was under the license of Thomas Wearing. Replication and issue, as in plea 3, *mutatis mutandis*.

5. That, before and at the times when &c., defendant was, and from thence hitherto hath been, and still is, the occupier of a certain messuage and farm in the parish &c.; and that, for the full period of sixty years next before the commencement of this suit and also before the times when &c., or any or either of them, the respective occupiers, for the time being, of the said messuage and farm have actually cut, dug, and removed, and been accustomed to cut, &c., as of right and without interruption, reasonable quantities of turf and peat, respectively growing and being in and upon the close in which &c., and seise, take, and

carry away the same, and convert and dispose thereof to their own use as such occupiers of the said messuage and farm, for the purpose of burning and consuming the same as necessary fuel in and upon the said messuage and farm, for the more convenient use and enjoyment thereof, every year and at all times of the year, as to the said messuage and farm, with the appurtenances, belonging and appertaining: That, during the said period of sixty years next before &c., to wit before and at the said times when &c., defendant, being the occupier of the said messuage and farm, at the times when &c., having occasion for and requiring certain reasonable quantities of turf and peat for the purpose of burning and consuming the same as necessary fuel in and upon the said messuage and farm for the more convenient use and enjoyment thereof, at the times when &c., the same being seasonable and proper times in that behalf, entered into the close in which &c., in order to cut, dig up, and remove reasonable quantities of the said turf and peat growing and being in and upon the close in which &c., for the purpose last aforesaid; and did then cut, dig up, and remove the said quantities of turf and peat in the declaration mentioned, the same then being turf and peat fit and proper to be cut, dug up, and removed for the purpose last aforesaid, and being reasonable quantities for that purpose; and then seized, took, and carried away the same, and converted and disposed thereof to his own use as such occupier of the said farm and lands, for the purpose of burning &c. the same as necessary fuel in and upon the said messuage and farm, for the more convenient use &c. thereof: and, because, at the said times when &c. (justification of the other trespasses as necessarily and unavoidably done in the exercise of the right): verification. Replication, traversing the sixty years' prescription. Issue thereon.

6. Similar prescription for thirty years; and justification under it. Replication, traversing this prescription. Issue thereon.

The plaintiff, as to the 5th plea, new assigned, also, that he brought the action and declared, not only for the trespasses in the 5th plea mentioned and therein attempted to be justified, but also for that defendant, on the days and times in the declaration in that behalf mentioned, with force and arms, committed the said trespasses in the declaration mentioned on other and different occasions, and for other and different purposes, than the purpose in the 5th plea in that behalf mentioned, and to a greater extent and degree than were necessary or proper for the purpose in the 5th plea mentioned; in manner and form as in the declaration &c.

There was a similar new assignment as to the sixth plea.

The defendant pleaded three pleas, each to both of the new assignments; namely, —

1. Not guilty. Issue thereon.

2. A plea corresponding to the fourth plea to the declaration, alleging a license from Thomas Wearing. Replication, traversing such license, as before. Issue thereon.

3. A plea corresponding to the third plea to the declaration, alleging a license from Henry Thompson. Replication traversing such license as before. Issue thereon.

On the trial before *Cresswell*, J., at the Yorkshire Summer Assizes, 1845, it appeared that the plaintiff was tenant in common with other parties of the close in question. The defendant's counsel thereupon claimed a verdict on the issue upon the second plea to the declaration: but the learned judge directed a verdict on this issue for the plaintiff, reserving leave to move to enter a verdict for the defendant. In support of the pleas of prescription, the defendant proved that the close in question was part of a mountain district within a manor; and he offered evidence of user in different parts of this district; but no exercise of user was shown on the particular close. The plaintiff's counsel contended that this was not evidence upon which the jury could find for the defendant upon the issues on the fifth and sixth pleas to the declaration. The learned judge overruled the objection, and left the evidence to the jury. Verdict for the defendant upon the issues on the fourth, fifth, and sixth pleas to the declaration, and the second plea to the new assignments; and for the plaintiff on all the other issues.

In Michaelmas Term, 1845, *Martin* obtained a rule to show cause why judgment should not be entered for the plaintiff, with 1*s.* damages, notwithstanding the verdict found for the defendant on the issues raised by the fourth, fifth, and sixth pleas to the declaration, and the third [1] plea to each of the new assignments, or why a new trial should not be had, on the ground of misdirection; and *Pashley* obtained a rule *nisi* to enter a verdict for the defendant on the issue upon the second plea to the declaration.

In Michaelmas Vacation, 1846, *Pashley* showed cause against the plaintiff's rule.

Martin (with whom was *Manisty*), *contra*. The plaintiff is entitled to make the rule absolute on all the points: but he will be satisfied with judgment *non obstante* the verdict on the second plea to the new assignment. (He was then stopped by the court.)

Lord Denman, C. J. In my opinion, the fourth plea to the original declaration and the second plea to the new assignments are bad. The turf is composed of the grass and soil on which it grows, as peat is the vegetable and the soil of which it has become a part. The turf does not so grow as to become part of the accruing profits which are the subject of enjoyment by the tenants in common. It is admitted that, if there has been an ouster, the present action will lie; that taking a chattel away constitutes an ouster; and that in all cases the destruction of the property is also an ouster. In *Clayton* v. *Corby*, 5 Q. B. 415, a prescription, in a plea, to take *in alieno solo* as much clay for making bricks at defendant's brick-kiln as he required, was held bad; the prin-

[1] Apparently a mistake for *the second*, owing to the justifications to the new assignment being pleaded in an order different from that of the justifications to the original declaration. — Rep.

ciple of that case was that such a taking destroyed the subject-matter. I consider this, therefore, an ouster effected by means of the destruction of the property. No authority contradicts this view: we cannot act upon what Lord Thurlow said in *Goodwyn* v. *Spray*, 2 Dick. 667, without knowing the circumstances of that case more fully.

Coleridge, J. The plaintiff now confines his claim to the new assignment. We must, therefore, see what the facts pleaded amount to. It must be admitted, on the part of the plaintiff, that the tenant might license the doing of whatever he might do himself; and, on the other hand, the defendant must admit that this does not include acts of destruction. Now, taking turf is not like taking the *vestura terræ*, or other growing profits. Were we to hold that a tenant in common could take away the turf, we must say also that one tenant in common could carry all the brick earth from the surface; and it is impossible to say where we could stop.

Wightman, J. The plaintiff complains that the defendant has made holes in his close, and has dug up, carried away, and converted turf. The defendant says he did this in exercise of a right of common of turbary. The plaintiff, as to that, new assigns, stating that he brought his action for trespasses committed for other purposes than the exercise of the right of common. To this the only justification pleaded and affirmed by the verdict is leave and license by a tenant in common. The case, therefore, is as if the only plea to the declaration had been leave and license by the tenant in common. Can, then, one tenant in common license the taking away the soil? It is as if the action had been brought against the tenant in common himself; for he could not authorize another to do that which he himself could not do. Now, that if the action had been against the tenant in common, the plaintiff must have succeeded, appears sufficiently from Co. Lit. 200 a.

Rule absolute for judgment on the new assignments, *non obstante veredicto*.

Martin and *Manisty* then showed cause against the rule for entering a verdict for defendant on the second issue (before Lord Denman, C. J., Coleridge and Wightman, JJ.).

Pashley, contra. *Cur. adv. vult.*

Lord Denman, C. J., in Hilary Term delivered the judgment of the court.

In this action of trespass for cutting turf, all the points were disposed of on the argument, except the question on the plea of Not possessed. The evidence showed the plaintiff to be but a tenant in common of the *locus in quo*, and indeed, further, that the defendant had been authorized to commit the trespass by another of the tenants in common. This latter fact is immaterial for the purpose of the present question, except as it furnishes an example of the necessity for holding here that the plaintiff was possessed for the purpose of bringing trespass. For, if possession in such case imported exclusive posses-

sion, one tenant in common might destroy the subject-matter for his own benefit, and his co-tenant be without this remedy. If the plaintiff had joined the co-tenant in bringing the action, that co-tenant would of course have released the defendant, whose act of trespass was committed under his orders. The plaintiff can recover such damages only as are proportionate to his interest in the property: but the wrong-doer has no right to put him to the proof of more than is necessary to show him injured by the wrong done. And, if the defendant thinks he can have any advantage from the joint interest of another, he must plead it in abatement.

Rule discharged.[1]

THOMAS *v.* THOMAS.

EXCHEQUER. 1850.

[*Reported* 5 *Exch.* 28.]

ASSUMPSIT for money had and received to the plaintiff's use. — Plea, *Non assumpsit.*

At the trial, before *Rolfe*, B., at the last Herefordshire Summer Assizes, it appeared that the plaintiff and one Benjamin Thomas, the defendant's late husband, were entitled, under the will of one Alice Thomas, to certain premises as tenants in common; but that Benjamin Thomas, for some time previously to his death, in February, 1848, received the whole rent. It was admitted that the plaintiff was entitled to half of the rent, as such tenant in common, and the present action was brought to recover the moieties of five years' rent. On the part of the defendant, it was objected that this form of action would not lie by one tenant in common against his co-tenant; and a verdict was taken by consent for the plaintiff, leave being reserved for the defendant to move to enter a nonsuit.

A rule *nisi* having been obtained accordingly,

Whateley and *W. H. Cooke* showed cause.

Keating and *Skinner*, in support of the rule. *Cur. adv. vult.*

The judgment of the court was now delivered by

PARKE, B. The question in this case is, whether an action for money had and received lies by one tenant in common against his companion. On the argument, the authorities on the subject on both sides were cited.

It appears to us to be clear, from Co. Lit. 200 b, that by the common law a tenant in common could bring no such action as this. In that page several cases are put in which one tenant in common may bring an action against his companion; but it is there said, that if two be tenants in common of a chattel, and one of them takes it away, the

[1] But see *Wait* v. *Richardson*, 33 Vt. 190 (1860).

other has no remedy by action, except when the subject-matter is destroyed, but must watch his opportunity to retake it. Several other instances are there put, illustrative of these distinctions; and it is expressly laid down, that no action of account lay by the common law by one tenant in common against his companion for taking more than his share of the profits, unless where he had constituted him his bailiff to receive them. Now, this want of remedy by the common law was provided for by the Stat. 4 Anne, *c.* 16, s. 27, which enables one tenant in common to maintain an action of account against the other as bailiff, for receiving more than his due share or proportion; in which case, however, he is entitled to all the rights and indemnities of a receiver, and consequently would be able to show that the money had been lost without his fault; whereas, in an action for money received to the use of another, the defendant is liable for the money absolutely. It is clear, therefore, that the Statute of Anne only gives an action of account, in which the receiver would be entitled to all just allowances; and if so, that this action for money had and received will not lie.

A question occurred to my mind, which I thought worthy of consideration, namely, whether this action might not lie, on the principle that, where there are tenants in common of a reversion (as, for instance, of a reversion of land let on lease), they may either join in their action for rent, or bring several actions. If a tenant in common can recover a moiety of the rent (as, for instance, supposing the rent to be £40, that he could recover £20), there might be a color for saying that the other could sue him for half of a whole amount wrongfully received. But that is explained by Lord Holt, in *Midgley* v. *Lovelace*, Carth. 289, and *Martin* v. *Crompe*, 1 Ld. Raym. 340. He says, that where a tenant in common severs in such an action, he cannot recover half the sum *nominatim*, but only half of the rent; thus showing that the rent continues unsevered.

It appears to us, therefore, that the case of a tenant in common who receives the whole of the rent due to himself and his companion is analogous to the case of a tenant in common taking the whole of a chattel into his possession; in which case neither trespass nor trover lies against him. The plaintiff's only remedy here is therefore by action of account, and this rule must be made absolute.

Rule absolute.[1]

[1] In some of the United States the contrary is held. *Brigham* v. *Eveleth*, 9 Mass. 538 (1813). *Borrell* v. *Borrell*, 33 Pa. 492 (1859). Cf. Freem. Co-ten. §§ 280–285. See also *Munroe* v. *Luke*, 1 Met. 459 (1840); *Richardson* v. *Richardson*, 72 Maine, 403 (1881); *Hudson* v. *Coe*, 79 Me. 83 (1887).

HENDERSON *v.* EASON.

EXCHEQUER CHAMBER. 1851.

[*Reported* 17 *Q. B.* 701.]

ACCOUNT. The declaration stated: That heretofore, and in the lifetime of the said Edward Eason, viz. on 18th November, 1833, and from thence continually for a long time in the lifetime of E. E., viz. until and upon 18th November, 1839, on which last mentioned day E. E. died, the plaintiff and E. E. were seised in their demesne as of fee as tenants in common of and in certain messuages, lands, and hereditaments, consisting of divers, to wit, twenty messuages, twenty cottages, &c., one hundred acres of meadow land, &c., with the appurtenances, situate &c. in the several parishes of Saint John the Baptist and Saint Peter the Apostle in the Isle of Thanet in the county of Kent: that is to say, the plaintiff during the time aforesaid was seised in his demesne as of fee of and in one undivided half part or moiety thereof, and the said E. E. in his lifetime during the time aforesaid was seised in his demesne as of fee of and in the other undivided half part or moiety thereof: and the said E. E. in his lifetime during all the time aforesaid had the care and management of the whole of the said messuages, lands, and hereditaments with the appurtenances aforesaid, to receive and take the rents and profits thereof to the common profit of the plaintiff and the said E. E. deceased, and, as bailiff of the plaintiff, of what he the said E. E. received more than his just share and proportion thereof, to render a reasonable account thereof to the plaintiff, and his said share thereof, when the said E. E. should be thereunto afterwards requested so to do, according to the form of the Statute in such case &c. Averment: That E. E. in his lifetime, during the time aforesaid, received more than his just share and proportion of the rents, issues, and profits of the tenements aforesaid with the appurtenances, and the plaintiff's share thereof, that is to say the whole of the rents, issues, and profits of the said tenements with the appurtenances, amounting to a large sum of money, viz. £2000; and that the said E. E. deceased did not nor would at any time in or during his lifetime render a reasonable account to plaintiff of the said rents, issues, and profits by him the said E. E. so received as aforesaid, or of either of them or any part thereof, or of the said share of the plaintiff of and in the same for the time aforesaid or any part thereof, but wholly neglected and refused so to do: And, although, afterwards and after the death of E. E., viz. on 1st May, A. D. 1840, defendant as such executor as aforesaid was requested by plaintiff to render a reasonable account to plaintiff of the said rents, issues, and profits by the said E. E. so received as aforesaid, and the plaintiff's said share thereof, and although a reasonable time has elapsed since such request made as aforesaid and before the commencement of this

suit, yet defendant, as such executor as aforesaid, has not at any time rendered a reasonable account to plaintiff of the said rents, &c. by the said E. E. deceased so received &c., or any part thereof, or of the said share &c. or any part thereof, but so to do the defendant as such executor as aforesaid wholly neglected and refused, contrary to the form of the Statute &c., and to the damage of plaintiff &c.

Pleas. 1. That E. E. had not in his lifetime the care and management of the whole of the said messuages, lands, and hereditaments with the appurtenances, to receive and take the rents, issues, and profits thereof to the common profit of plaintiff and of the said E. E. deceased, and, as bailiff of the plaintiff of what he the said E. E. received more than his just share and proportion thereof, to render a reasonable account thereof to the plaintiff, and his said share thereof, when he the said E. E. should be thereunto requested, according to the form of the Statute in such case &c., in manner and form &c. Conclusion to the country.

2. That E. E. did not in his lifetime receive more than his just share and proportion of the rents, issues, and profits of the said tenements with the appurtenances, in manner and form &c. Conclusion to the country.

Issues were joined on both pleas.

On the trial, before *Coleridge*, J., at the London Sittings in Hilary Term, 1850, a verdict was found for the plaintiff on both issues, the defendant's counsel tendering a bill of exceptions.

Judgment was entered up: That the defendant, as such executor as aforesaid, account with the plaintiff of the time aforesaid in which the said E. E. was bailiff of the plaintiff and had the care and management of the aforesaid messuages, lands, &c., to receive and take &c. to the common profit of the plaintiff and the said E. E.: and an account was afterwards taken and declared by auditors assigned by the court, namely by two of the masters, who found, and reported and certified under their hands and seals, that the sum of £900 was due to the plaintiff from the defendant as executor &c.: wherefore it was considered that plaintiff should recover from defendant, as executor, the £900, and costs &c.

The defendant brought error in the Exchequer Chamber. By the bill of exceptions, annexed to the writ of error, it was stated:

That, upon the trial of the said issues, the counsel for the plaintiff proved that the plaintiff and Edward Eason were, from 18th November, 1833, to 18th November, 1838, seised in their demesne as of fee as tenants in common of and in the hereditaments in the declaration mentioned; and that those hereditaments consisted of a certain farm called Nash Farm, that is to say a certain messuage and outbuildings, and about 133 acres of land; and that E. E. during all the time aforesaid occupied the whole of the said farm on his own account, and that plaintiff did not at any time during the time aforesaid occupy any part of the said farm, and the said E. E. cultivated the same on his own account solely, and appropriated the produce thereof to his own use; that the

farm was cropped in the usual way by the said E. E.; and that the said E. E. kept the usual quantity of live and dead stock, and farmed the land well, and that he received all the produce of the farm and sold it on his own account; and that the farm was of the value of £300 a year to let. And thereupon counsel for plaintiff insisted that the facts so proved were conclusive that E. E. had in his lifetime the care and management of the whole &c. to receive &c., and, as bailiff &c., to render &c. (as in the declaration and 1st plea), in manner and form in the declaration alleged: And also that the said facts so proved were presumptive evidence that the said E. E. did in his lifetime receive more than his just share and proportion of the rents, issues, and profits of the said tenements &c. in manner and form &c.: That counsel for defendant insisted that the matters so proved were not so conclusive to the effect and in manner insisted on by counsel for the plaintiff: And the judge declared his opinion to the jury that the said matters &c. so proved &c. were respectively conclusive and presumptive evidence to the effect and in manner insisted on by counsel for the plaintiff, and then directed the said jury, if they believed the said matters and things so proved and given in evidence, to find a verdict for the plaintiff upon each of the said issues, and with this statement and direction left the case to the jury. To which statement and direction of the judge the counsel for defendant excepted.

And counsel for defendant then argued and contended before the judge that a tenant in common of lands was not, by reason of the mere occupation by him of those lands, and by reason of the receipt of the whole of the produce of the said farm, and the sale of the said produce on his own account, liable in an action of account to his co-tenant in common: which said argument and contention the said judge then overruled, and directed the jury that the said Edward Henderson (defendant) was, by reason of such occupation as aforesaid of the said farm by the said E. E., and by reason of the receipt by E. E. of the whole produce of the said farm, and the sale of the said produce on his own account, in the absence of any evidence to the contrary, liable to the said plaintiff in an action of account. To which &c.: exception, as before.

And the said counsel &c.: further argument for defendant, That the mere occupation of lands by a tenant in common of them, and the receipt by the said tenant in common of the whole of the produce of the said lands, and the sale by him of the said produce on his own account, did not, as a matter of law, constitute him bailiff of his co-tenant in common of those lands of what he received beyond his just share: which argument the judge overruled, and directed the jury that such occupation as aforesaid by the said E. E., and the receipt by him the said E. E. of the whole of the produce of the said lands, and the sale by him of the said produce on his own account, did as a matter of law constitute him bailiff of the said plaintiff of what he received beyond his just share. To which &c.: exception as before.

The grounds of error specially assigned were the rulings stated, as above, in the bill of exceptions. Joinder in error.

The writ of error was argued in Easter Vacation, May 14th, 1851, before MAULE and WILLIAMS, JJ. and PARKE, PLATT, and MARTIN, BB.; and in Trinity Vacation, June 19th, 1851, before MAULE, CRESSWELL, and WILLIAMS, JJ., and PARKE, ALDERSON, and MARTIN, BB.

W. H. Watson, for the plaintiff in error, defendant below.

Channell, Serjt., for the defendant in error (plaintiff below).

Cleasby (in the absence of *Watson*), in reply.

Cur. adv. vult.

PARKE, B., now delivered the judgment of the court.

This case was heard before us at the sittings after last Trinity Term. It is an action of account founded on the Statute 4 Ann. *c.* 16, by Robert Eason against the executor of his co-tenant in common, Edward Eason. The declaration states: (His Lordship here stated the substance of the count, set forth *ante*, page 652.) There is an averment that Eason in his lifetime received more than his just share and proportion of the rents, issues, and profits of the said tenancy, that is to say the whole of the rents, issues, and profits, and had not rendered an account to the plaintiff.

There were two pleas to the declaration: (His Lordship stated the pleas, as set forth, *ante*, page 653.)

Issue being joined on these pleas, evidence was given that the two Easons were tenants in common in fee of a messuage and farm of above 133 acres of land from November, 1833, to November, 1838, during which time Edward Eason occupied the whole on his own account, the plaintiff occupying no part: that he cultivated the same on his own account solely, and appropriated the produce to his own use; and that he cropped the farm in the usual way, kept the usual quantity of live and dead stock, and farmed well; and that he received all the produce of the farm, and sold it on his own account.

On the trial, before our Brother *Coleridge*, the plaintiff's counsel insisted that this evidence was conclusive on the first issue, and presumptive evidence on the last, in favor of the plaintiff: and so the learned judge held, in compliance with the ruling of the Court of Queen's Bench on a special case between the same parties, reported in 12 Queen's Bench Reports, 986.

That case was stated by leave of a judge, in an action brought by order of the late Lord Chancellor. The Lord Chancellor, we are told, was dissatisfied with that proceeding for certain reasons wholly immaterial to be inquired into by us, and directed this action to be brought, in which the important question between the parties is to be settled.

There is no doubt as to the law before the Statute of 4 Ann. *c.* 16. If one tenant in common occupied, and took the whole profits, the other had no remedy against him whilst the tenancy in common continued, unless he was put out of possession, when he might have his ejectment,

or unless he appointed the other to be his bailiff as to his undivided moiety, and the other accepted that appointment, when an action of account would lie, as against a bailiff of the owner of the entirety of an estate.

Until the Statute of Anne this state of the law continued. That Statute provides, by section 27, that an action of account may be brought and maintained by one joint tenant and tenant in common, his executors and administrators, against the other, for *receiving* more than comes to his just share or proportion, and against the executor and administrator of such joint tenant or tenant in common; and the auditors are authorized to administer an oath.

Declarations framed on this Statute vary from those at common law, as it is an essential averment in them that the defendant has *received* more than his share. This was held in the case of *Wheeler* v. *Horne*, Willes, 208, and in *Sturton* v. *Richardson*, 13 M. & W. 17.

Under the Statute of Anne he is bailiff only by virtue of his receiving more than his just share, and as soon as he does so, and is answerable only for so much as he actually *receives*, as is fully explained by Lord Chief Justice Willes in the case above cited. He is not responsible, as a bailiff at common law, for what he might have made without his wilful default.

It is to be observed that the Statute does not mention lands or tenements, or any particular subject. Every case in which a tenant in common *receives* more than his share is within the Statute; and account will lie when he does *receive*, but not otherwise. It is to be observed, also, that the receipt of *issues and profits* is not mentioned, but simply the receipt of more than comes to his just share; and, further, he is to account when he *receives*, not *takes*, more than comes to his just share. What, then, is a "*receiving*" of more than comes to his just share, within the meaning of that provision in the Statute of Anne?

It appears to us that construing the Act according to the ordinary meaning of the words, this provision of the Statute was meant to apply only to cases where the tenant in common receives money or something else, where another person gives or pays it, which the co-tenants are entitled to simply by reason of their being tenants in common, and in proportion to their interests as such, and of which one receives and keeps more than his just share according to that proportion.

The Statute, therefore, includes all cases in which one of two tenants in common of lands leased at a rent payable to both, or of a rent-charge, or any money payment or payment in kind, due to them from another person, receives the whole or more than his proportionate share according to his interest in the subject of the tenancy. There is no difficulty in ascertaining the share of each, and determining when one has received more than his just share: and he becomes, as to that excess, the bailiff of the other, and must account.

But when we seek to extend the operation of the Statute beyond the ordinary meaning of its words, and to apply it to cases in which one

has enjoyed more of the benefit of the subject, or made more by its occupation, than the other, we have insuperable difficulties to encounter.

There are obviously many cases in which a tenant in common may occupy and enjoy the land or other subject of tenancy in common solely, and have all the advantage to be derived from it, and yet it would be most unjust to make him pay anything. For instance, if a dwelling house, or barn, or room, is solely occupied by one tenant in common, without ousting the other, or a chattel is used by one co-tenant in common, nothing is received; and it would be most inequitable to hold that he thereby, by the simple act of occupation or use, without any agreement, should be liable to pay a rent or anything in the nature of compensation to his co-tenants for that occupation or use to which to the full extent to which he enjoyed it he had a perfect right. It appears impossible to hold that such a case could be within the Statute; and an opinion to that effect was expressed by Lord Cottenham in *M'Mahon* v. *Burchell*, 2 Phillips's Rep. 134. Such cases are clearly out of the operation of the Statute.

Again, there are many cases where profits are made, and are actually taken, by one co-tenant, and yet it is impossible to say that he has received more than comes to his just share. For instance, one tenant employs his capital and industry in cultivating the whole of a piece of land, the subject of the tenancy, in a mode in which the money and labor expended greatly exceed the value of the rent or compensation for the mere occupation of the land; in raising hops, for example, which is a very hazardous adventure. He takes the whole of the crops: and is he to be accountable for any of the profits in such a case, when it is clear that, if the speculation had been a losing one altogether, he could not have called for a moiety of the losses, as he would have been enabled to do had it been so cultivated by the mutual agreement of the co-tenants? The risk of the cultivation, and the profits and loss, are his own; and what is just with respect to the very uncertain and expensive crop of hops is just also with respect to all the produce of the land, the *fructus industriales*, which are raised by the capital and industry of the occupier, and would not exist without it. In taking all that produce he cannot be said to receive more than his just share and proportion to which he is entitled as a tenant in common. He receives in truth the return for his own labor and capital, to which his co-tenant has no right.

In the case before Lord North in Skinner (Anonymous in Chancery, Skinn. 230), in which it is said that, if one of fourtenants in common stock land and manage it, the rest shall have an account of the profits, but if a loss come, as of the sheep, they shall bear a part, it is evident, from the context, Lord North is speaking of a case where one tenant in common manages by the mutual agreement of all for their common benefit; for he gives it as an illustration of the rights of a part owner

of a ship to an account when the voyage is undertaken by his consent, expressed or implied.

Where the natural produce of the land is augmented by the capital and industry of the tenant, grass, for instance, by manuring and draining, and the tenant takes and sells it, or where, by feeding it with his cattle, he makes a profit by it, the case seems to us to be neither within the words or spirit of the Act, though there are not cases of *fructus industriales* in either case.

It may be observed, however, that the evidence stated in the bill of exceptions does not raise either of these points.

We therefore think that, upon the evidence set out in this case, there was nothing to warrant the jury in coming to the conclusion that the defendant received more than his just share within the meaning of the Act; and that the direction of the learned judge as to the second issue was therefore wrong. And we also think that there was no conclusive or sufficient, or indeed any, evidence that he had the care and management of the farm *for their common profit*, as averred in the declaration. We therefore think that there should be

Judgment to reverse the judgment of Q. B., and for a venire de novo.[1]

LEIGH *v.* DICKESON.

QUEEN'S BENCH DIVISION. 1883.

[*Reported* 12 *Q. B. D.* 194.]

FURTHER CONSIDERATION.

This was an action tried before *Pollock*, B., in which the plaintiffs and the defendant were tenants in common of a house, on which the defendant had expended money in ordinary repairs. The defendant claimed, by way of set-off, contribution in respect of the money so expended.

Grantham, Q. C., and *Gore*, for the plaintiffs.

Finlay, Q. C., and *C. A. Russell*, for the defendant.

Cur. adv. vult.

POLLOCK, B. This action is brought by the plaintiffs, as trustees of Mrs. Eyles, to recover from the defendant the sum of £24 9*s.* 6*d.*, which they allege to be due to them from the defendant for the use and occupation by the defendant of three-fourths of premises in Market Lane, Dover, for 264 days at the rate of £45 per annum, and also three quarters' rent of a piece of land and buildings at the rear of the above. With regard to the second claim, the amount of it was

[1] Contra, *Early* v. *Friend*, 16 Grat. 21 (1860); *Hayden* v. *Merrill*, 44 Vt. 336 (1872).

tendered before action, and has been paid into court, and therefore no question now arises with respect to it. As to the claim in respect of the three-fourths of the above premises, the case was heard before me without a jury at the Lewes Assizes, and afterwards upon further consideration, when the following facts were agreed upon by counsel.

In 1860, Mrs. Eyles (then Mrs. Worger) was entitled to an undivided three-fourths of the house in Queen Street, Dover, as tenant in common with another; and on the 4th of January in that year, Mrs. Worger, by lease, let to one Prebble for twenty-one years her interest at the rent of £33 15*s.* per annum. This lease contained a covenant on the part of the tenant to execute internal repairs, and on the part of Mrs. Worger to execute external repairs. In 1865 the lease was assigned by Prebble to the defendant, who entered and paid rent. In 1871 the defendant purchased the one-fourth interest of the other tenant in common. On the 6th of January, 1881, the lease expired, and the defendant continued in possession. A correspondence then took place between the plaintiffs and defendant and their solicitors with a view to continue the tenancy, but the plaintiffs asking for an advanced rent, which the defendant was unwilling to pay, no further agreement was effected. On the 15th of February, 1882, the present action was commenced, the plaintiff claiming for use and occupation since the expiration of the lease. It was also admitted that upon the 24th of January, 1881, proceedings had been taken by the plaintiffs against the defendant in the County Court of Kent. These do not, however, appear to me to be relevant to the claim in the present action, and therefore I make no further reference to them.

On behalf of the defendant it was contended that the action would not lie, because one tenant in common cannot sue another tenant in common for the rent of premises owned by them. It is, however, unnecessary to deal with this general proposition, because in the present case a claim is made by the plaintiffs against the defendant not simply to recover the value of premises occupied by him as tenant in common, but it is brought for the use and occupation of the three-fourths of the premises which were let by the plaintiffs' *cestui que trust* to Prebble in 1860, by a lease which was afterwards assigned by Prebble to the defendant, who entered and paid rent. Having carefully considered the correspondence that passed between Mrs. Eyles and her solicitors and the defendant and his solicitors, I have come to the conclusion that the occupation by the defendant, which occurred after the expiration of the lease in question on the 6th of January, 1881, must be referred, not to his right as tenant in common, but to his continuing in occupation as tenant at sufferance. Now it is quite clear from the authority of Lord Coke in Co. Lit. 186 a. which was adopted by the court in *Corper* v. *Fletcher*, 6 B. & S. 464, that one joint tenant may let his part for years or at will to his companion, and I think it is equally clear that if after the expiration of such a lease the tenant holds over, the same consequences must be taken to follow as would arise in the

case of a lease between strangers, and that the lessor would have a right to treat the defendant as a tenant at sufferance for the period during which he held after the expiration of the lease, and to sue him for use and occupation in respect thereof. If any authority were required for this, the case of *Bayley* v. *Bradley*, 5 C. B. 396, seems to suffice. Looking, therefore, at the case in this light, my judgment will be for the amount claimed, £24 9*s.* 6*d.*, being the amount recoverable for 264 days' occupation at the same rate as was reserved by the lease.

This disposes of the plaintiffs' claim. The defendant, however, by way of counter-claim, charges the plaintiffs with a sum of £80, which, he alleges, he laid out and expended in substantial and other proper repairs and improvements upon the premises since the expiration of the lease. With regard to this claim, it is first to be observed that it is made not in respect of any breach by Mrs. Eyles or her trustees of the covenant contained in the lease, but for what are called substantial and proper repairs and improvements. To this set-off and counter-claim the plaintiffs demur, and it was admitted by counsel that if the demurrer should be overruled, the defendant was entitled to judgment upon the counter-claim, so that any question of amount, and any distinction which might be taken between repairs and improvements, is apparently waived, and the question is broadly raised whether, having reference to the legal relation which existed between the parties, the plaintiffs are liable to recoup the defendant for money so laid out by him in repairing the premises in the absence of any express contract. There is, however, nothing to show that but for them the subject-matter of the tenancy in common would have perished, so as to bring the case within the principle of those decisions in which it has been held that, where an outlay is in the nature of salvage, all interested in the thing saved are bound to contribute.

No case or authority was cited by counsel to show that going back for a long period of years effect has ever been given by the courts to a claim by action by one tenant in common against another for money which had been expended upon the repair of their common property, nor have I been able to find any such case or authority, although the claim deals with a matter of common occurrence, and the question must often have arisen if the defendant's contention be correct. It becomes necessary, therefore, to refer to the older law, and to see upon what principle any claim of a like nature has been rested, and how far, if at all, it would govern a case like the present. The writ by one of two tenants in common against the other *de reparatione facienda* is mentioned by the earlier law writers. Coke, in his Commentary upon Littleton, Co. Lit. 200 b, speaks of it thus: "If two tenants in common, or joint tenants, be of an house or mill, and it fall in decay, and the one is willing to repair the same and the other will not, he that is willing shall have a writ *de reparatione facienda*, and the writ saith, *ad reparationem et sustentationem ejusdem domus teneantur*; whereby it appeareth that owners are in that case bound *pro bono publico*

to maintain houses and mills which are for habitation and use of men."

The right to this writ is also mentioned in almost similar terms in *Lewis Bowles' Case*, 11 Rep. 82 b., where it is said: "If there be two joint tenants of a wood, or arable land, the one has no remedy against the other to make enclosure or reparations for safeguard of the wood, or corn, but if there be two joint tenants of an house the one shall have a writ *de reparatione facienda* against the other, and the words of the writ are *ad reparationem et sustentationem ejusdem domus tenetur*." Similar statements of the law will be found in 2 Co. Inst. 402, and Moor's Rep. 374. The writ is also mentioned in 2 Cruise's Dig. 377, as a common law writ.

The later authorities in substance adopt these two, and refer to them in much the same language. It is curious to observe that the remedy between the joint tenants is spoken of as if it was one which existed rather for the benefit of the community than of the joint tenant, but what is more to the purpose is to notice that in these passages and in the books in which the form of the writ itself is given, as in Fitzherbert's N. B. p. 127, and the *Registrum Brevium*, p. 153 b, the writ is to be found amongst those which require acts to be done by way of reparation, such as the repairing of mills either by the county or by an individual who is liable, the repairing of a bridge, wall, road, sewer, or pavement, the repairing by a neighbor of his house which is so in decay as to be dangerous; and in all these cases the ground of the claim seems to be such as to presuppose that the condition of the things to be repaired would be dangerous or useless unless the repairs in question were effected. This procedure differs widely from the right alleged in the present case of one tenant in common to expend money in the ordinary repairs of a house, and then recover from his co-tenant his share. In *Dering* v. *Earl of Winchelsea*, 1 Cox, 318, Eyre, C. B., speaking of the right to contribution among sureties, mentions the case of tenants in common, and refers to the writ in Fitzherbert. He speaks of contribution generally as being founded upon an equitable right based upon general principles, and in the recent case of *Leslie* v. *French*, 23 Ch. D. 552, this *dictum* was cited by counsel; but I do not find that it received any assent in the judgment of Fry, L. J., and in neither of these cases — one being a claim between co-sureties, and the other a claim between co-owners of a policy of insurance — was it necessary to consider what was the law as applicable to tenants in common.

In Story's Eq. Jurisp. s. 1235, the subject is treated of, and the writer refers to some cases which have arisen in the courts of America, but the only one which bears upon the question now before the court is that of *Converse* v. *Ferre*, 11 Mass. 326, in which Parker, C. J., says that "At common law no action lies by one tenant in common who has expended more than his share in repairing the common property against the deficient tenants," and he goes on to say that for this reason

the Legislature of the State provided a remedy, which was applicable however to mills only.

An interesting judgment by Chancellor Kent upon the subject of contribution will be found in the case of *Campbell* v. *Mesier*, 4 John. 334. A bill was filed by one of two owners of adjoining houses separated by a party-wall. It was an old party-wall between the two houses, and the owner of one of them being desirous to build a new house on his lot, pulled down the old house, and with it the party-wall, which was ruinous, and rebuilt it with his new house. The owner of the adjoining house and lot was held to be bound to contribute ratably to the expense of the new wall of partition. The particular case was decided expressly upon the ground that it was absolutely necessary to have the wall rebuilt, and therefore it furnishes no authority for the right to contribution where ordinary repairs are done. In the course of the judgment Chancellor Kent refers to *dicta* expressed by different writers upon the civil law. One of these, Papinian (Dig. 17, 2, 52, 10), states it as a rule of the civil law, that if one part owner of a house in decay, repairs it at his own expense, upon the refusal of the others to unite in the expense, he can compel them to contribute their proportion, with interest, or, upon their default, at the end of four months, the house, at his election, becomes his sole property. This would seem only to apply to the case of such decay as would if not arrested by repair produce ruin. Pothier, speaking of party-walls, *Contrat de Société*, *Première Appendice*, No. 199, 203, accords the right to contribution for the rebuilding of a party-wall only where it is ruinous and needs to be rebuilt, independently of the raising of it by the part owner on one side.

I was referred during the course of the argument to a form of order which is to be found in Seton on Decrees, vol. ii. 1024, wherein an inquiry is directed as to what, if any, substantial repairs have been done by one or more of several tenants in common. This occurs in an order made in a suit for partition and sale, in which it is obvious the direction would be necessary, quite apart from such a right as is insisted upon by the defendant in the present action.

At common law no action of account lay by one joint tenant or tenant in common against his co-tenant. By the Statute of 4 Anne, *c.* 16, s. 27, a tenant in common could be charged by his co-tenant in an action at law as bailiff for money received, a share of which the plaintiff was entitled to. The same end could also be better attained by a bill in equity. The history of the action of account will be found in Viner's Abridgment, "Account," and under the same title in Selwyn's *Nisi Prius*. Except, however, in the case of a bill for partition I can find no trace of any action or claim in equity for contribution in respect of money expended for repairs.

This being the state of the authorities, the conclusion I arrive at is that the defendant has failed to establish his counter-claim against the plaintiffs. It may be said that this leaves the defendant to bear the

costs of repairs which in equity and fair dealing ought to be borne in part by the plaintiffs. There is something no doubt in this argument, but it must be remembered that the relation which exists between tenants in common is peculiar. In cases where the money expended is for ordinary repairs, and not such as are absolutely necessary for the prevention of ruin, the inconvenience of taking an account between the co-tenants whenever one has paid more than his share would be great, and in almost every case in which they are unable themselves to agree as to what repairs are needed and how the costs of them should be divided, the only efficient remedy would be attained by a partition.

There will be a verdict and judgment for the plaintiffs upon the claim for £24 9*s.* 6*d.*, and also upon the counter-claim with costs.

Judgment for the plaintiffs.[1]

PICKERING *v.* PICKERING.

SUPREME COURT OF NEW HAMPSHIRE. 1885.

[*Reported* 63 *N. H.* 468.]

BILL IN EQUITY, for an accounting between tenants in common. The defendant claimed to be allowed for necessary repairs made by him upon the premises without notice to the plaintiff.

John Hatch, for the plaintiff.

J. W. Emery, for the defendant.

BINGHAM, J. The plaintiff seeks for an accounting, and to charge the defendant for the rents and income of lands and buildings thereon. The parties are tenants in common. The defendant has had the possession and income of the property since December 27, 1883, and has in that time expended $370 in necessary repairs that materially increased the value of the buildings and the income, and claims to be allowed for the same in the accounting. The plaintiff had no notice of the repairs, and was not requested to join in making them.

If we are to consider it settled at common law that one tenant in common cannot recover of his co-tenant a contribution for necessary repairs, where there is no agreement or request or notice to join in making them, or excuse for a notice not being given to join (*Stevens* v. *Thompson*, 17 N. H. 103, 111; *Wiggin* v. *Wiggin*, 43 N. H. 561, 568), because both parties, until this is done, are equally in fault, one having as much reason to complain as the other (*Mumford* v. *Brown*, 6 Cow. 475–477; *Kidder* v. *Rixford*, 16 Vt. 169–172; 4 Kent Com. 371; *Doane* v. *Badger*, 12 Mass. 65–70; *Calvert* v. *Aldrich*, 99 Mass. 78), it does not follow that in this proceeding for an equitable accounting for the

[1] Accord., *Calvert* v. *Aldrich*, 99 Mass. 74 (1868). But see *Deck's Appeal*, 57 Pa. 467 (1868); *Beaty* v. *Bordwell*, 91 Pa. 438 (1879); *Alexander* v. *Ellison*, 79 Ky. 148 (1880); *Fowler* v. *Fowler*, 50 Conn. 256 (1882).

income, a part of which is produced by the repairs, the defendant may not be allowed for them. There is a wide difference between a right of action at common law to recover a contribution for repairs, and a right to have them allowed out of the income, which exists in part through their having been made. In the first case, the party makes them at his will on the common property without the consent or knowledge of his co-tenant, while in the last the co-tenant recognizes the existence of the repairs, that they have materially increased the income, but demands the increase and refuses to allow for the repairs. The objection, that no privity, no joint knowledge, no authority existed, is in equity and good conscience waived when the entire income is demanded. It is not unlike the ratification of the acts of an assumed agent: it relates back to the time of making the repairs, and makes the plaintiff a privy from the beginning. He cannot claim the repairs and the income, and equitably ignore the expense of making them.

In *Moore* v. *Cable*, 1 Johns. Ch. 385, a bill for the redemption of a mortgage, it was decided that the mortgagee should not be charged for rents and profits arising exclusively from repairs made by him.

In *Jackson* v. *Loomis*, 4 Cow. 168, an action of trespass for mesne profits against a *bona fide* purchaser, it was held that he should be allowed against the plaintiff, in mitigation of damages, the value of permanent improvements, made in good faith, to the extent of the rents and profits claimed by the plaintiff. *Green* v. *Biddle*, 8 Wheat. 1.

In *Rathbun* v. *Colton*, 15 Pick. 472, 485, it was decided that when the rent of a trust estate is increased in consequence of improvements made by the trustee, the beneficiary may be put to his election, either to allow the trustee the expense of such improvements, or be deprived of the increase of rent obtained by means thereof; that the question was not whether the trustee has a right to make a charge for the improvements, but whether the plaintiffs were entitled to receive any benefit for them, they refusing to contribute their share towards the expense.

It seems, however, that courts of equity have not confined the doctrine of compensation for repairs and improvements to cases of agreement or of joint purchases, but have extended it to other cases where the party making the repairs and improvements has acted in good faith, innocently, and there has been a substantial benefit conferred on the owner, so that in equity and right he ought to pay for the same. 2 Story Eq. Jur. §§ 1236, 1237, 799 b; *Coffin* v. *Heath*, 6 Met. 76, 80. And in 2 Story Eq. Pl. § 799 b, *n.* 1, it is said, — "In cases where the true owner of an estate, after a recovery thereof at law from a *bona fide* possessor for a valuable consideration, without notice seeks an account in equity as plaintiff against such possessor for the rents and profits, it is the constant habit of courts of equity to allow such possessor (as defendant) to deduct therefrom the full amount of all meliorations and improvements which he has beneficially made upon the estate, and thus to recoup them from the rents and profits. . . . So, if the true owner

of an estate holds only an equitable title thereto, and seeks the aid of a court of equity to enforce that title, the court will administer that aid only upon the terms of making compensation to such *bona fide* possessor for the amount of his meliorations and improvements of the estate beneficial to the owner." This is on the old, established maxim in equity jurisprudence, that he who seeks equity must do equity. *Hannan* v. *Osborn*, 4 Paige Ch. 336; *Deeh's Appeal*, 57 Penn. St. 468, 472; *Peyton* v. *Smith*, 2 Dev. & Bat. Eq. 325, 349; *Hibbert* v. *Cooke*, 1 Sim. & S. 552.

The sum of $370 for the repairs may be deducted from the income, if it amounts to that sum: if not, then to cancel the income, whatever it may be.

The claim for insurance should be disallowed. It does not appear that it was procured for the plaintiff, or in her interest, or with her knowledge, or that she has ever received or accepted any benefit arising from it.

Case discharged.

BLODGETT, J., did not sit; the others concurred.

OUSTER. — Cases of ouster turn generally upon matters of fact.

SECTION III.

PARTITION.

LIT. § 247. Also, there is another partition. As if there be four parceners, and they will not agree to a partition to be made between them, then the one may have a writ of *partitione facienda* against the other three, or two of them may have a writ of *partitione facienda* against the other two, or three of them may have a writ of *partitione facienda* against the fourth, at their election.

LIT. § 250. And note, that partition by agreement between parceners may be made by law between them, as well by parol without deed, as by deed.

CO. LIT. 169 a. Here it appeareth, that not only lands and other things that may pass by livery without deed, but things also that do lie in grant, as rents, commons, advowsons and the like, that cannot pass by grant without deed, whether they be in one county or in several counties, may be parted and divided by parol without deed. But a partition between jointenants is not good without deed, albeit it be of lands, and that they be compellable to make partition by the Statutes of 31 H. 8, *cap.* 10, and 32 H. 8, *cap.* 32, because they must pursue that act by writ *de partitione facienda*; and a partition between jointenants without writ remains at the common law, which could not be done by parol. And so it is and for the same reason of tenants in

common. But if two tenants in common be, and they make partition by parol, and execute the same in severalty by livery, this is good, and sufficient in law. And therefore where books say, the jointenants made partition without deed, it must be intended of tenants in common and executed by livery.

Lit. § 262. Also, if a man be seised in fee of a carve of land by just title, and he disseise an infant within age of another carve, and hath issue two daughters, and dieth seised of both carves, the infant being then within age, and the daughters enter and make partition, so as the one carve is allotted for the part of the one, as *per case* to the youngest in allowance of the other carve which is allotted to the purparty of the other, if afterward the infant enter into the carve whereof he was disseised upon the possession of the parcener which hath the same carve, then the same parcener may enter into the other carve which her sister hath, and hold in parcenary with her. But if the youngest alien the same carve to another in fee before the entry of the infant, and after the infant enter upon the possession of the alienee, then she cannot enter into the other carve; because by her alienation she hath altogether dismissed herself to have any part of the tenements as parcener. But if the youngest before the entry of the infant make a lease of this for term of years, or for term of life, or in fee tail saving the reversion to her, and after the infant enter, there peradventure otherwise it is; because she hath not dismissed herself of all which was in her, but hath reserved to her the reversion and the fee, &c.

Co. Lit. 173 b, 174 a. What if the whole estate in part of the purparty of one parcener be evicted by a title paramount; whether is the whole partition avoided, for that Littleton here putteth the case that the whole purparty of the one is defeated?

The second question is, whether if but part of the state of one coparcener be evicted, as an estate in tail, or for life, leaving a reversion in the coparcener, whether that shall avoid the partition in the whole?

To the first it is answered, that if the whole estate in part of the purparty be evicted, that shall avoid the partition in the whole, be it of a manor, that is entire, or of acres of ground, or the like that be several; for the partition in that case implieth for this purpose both a warranty and a condition in law, and either of them is entire, and giveth an entry in this case into the whole. And so hath it been lately resolved both in the case of exchange and of the partition.

To the second, if any estate of freehold be evicted from the coparcener in all or part of her purparty, it shall be avoided in the whole. As if A. be seised in fee of one acre of land in possession, and of the reversion of another expectant upon an estate for life, and he disseise the lessee for life who makes continual claim; A. dieth seised of both acres, and hath issue two daughters; partition is made, so as the one acre is allotted to the one, and the other acre to the other; the lessees enter: the partition is avoided for the whole, and so likewise hath it been lately resolved.

Yet there is a diversity between the warranty, and the condition which the law createth upon the partition. Where one coparcener taketh benefit of the condition in law, she defeateth the partition in the whole. But when she voucheth by force of the warranty in law for part, the partition shall not be defeated in the whole, but she shall recover recompense for that part. And therein also there is another diversity between a recovery in value by force of the warranty upon the exchange and upon the partition. For upon the exchange, he shall recover a full recompense for all that he loseth. But upon the partition she shall recover but the moiety, or half of that which is lost, to the end that the loss may be equal.[1]

Lit. § 290. Also, jointenants (if they will) may make partition between them, and the partition is good enough; but they shall not be compelled to do this by the law; but if they will make partition of their own will and agreement, the partition shall stand in force.

Lit. § 318. Also, tenants in common may well make partition between them if they will, but they shall not be compelled to make partition by the law; but if they make partition between themselves by their agreement and consent, such partition is good enough, as is adjudged in the book of assizes.

St. 31 Hen. VIII. c. 1.[2] II. Be it therefore enacted by the King our most dread sovereign lord, and by the assent of the Lords spiritual and temporal, and by the Commons, in this present Parliament assembled, that all joint tenants and tenants in common, that now be, or hereafter shall be, of any estate or estates of inheritance in their own rights, or in the right of their wives, of any manors, lands, tenements or hereditaments within this realm of England, Wales, or the marches of the same, shall and may be coacted and compelled, by virtue of this present Act, to make partition between them of all such manors, lands, tenements and hereditaments, as they now hold, or hereafter shall hold as joint tenants or tenants in common, by writ *de participatione faciendâ*, in that case to be devised in the King our sovereign lord's Court of Chancery, in like manner and form as coparceners by the common laws of the realm have been and are compellable to do, and the same writ to be pursued at the common law.

III. Provided alway and be it enacted, that every of the said joint tenants or tenants in common, and their heirs, after such partition made, shall and may have aid of the other or of their heirs, to the intent to deraign the warranty paramount, and to recover for the rate, as is used between coparceners after partition made by the order of the common law; anything in this Act contained to the contrary notwithstanding.

[1] See Rawle, Cov. for Title (5th ed.), §§ 277–279; *Weiser* v. *Weiser*, 5 Watts, 279 (1836); *Patterson* v. *Lanning*, 10 Watts, 135 (1840); *Walker* v. *Hall*, 15 Ohio, 355 (1864).

[2] The preamble is omitted.

MORRICE'S CASE.

COMMON PLEAS. 1585.

[*Reported* 6 *Co.* 12 *b.*]

BETWEEN Smith and Morrice, the case was such: two joint tenants are with warranty, and partition was made between them by judgment in a writ of *partitione facienda* by force of the Statute of 1 H. 8, *cap.* 1. And it was adjudged that the warranty remained because by the King's writ they are compellable by the Statute (to which every one is party) to make partition, and the party has pursued his remedy according to the Act, and therefore none can have wrong by the operation of the Statute, to which every one is party: but if they had made partition by deed, by consent, after the said Act, although they were compellable by writ to make partition, yet forasmuch as they had not pursued the Statute to make partition by writ, therefore such partition doth remain at the common law, and by consequence the warranty is gone, as it is agreed in 29 E. 3, Tit. Warranty, 70. And it was resolved, that after the said Statute, although now joint tenants are compellable to make partition by writ as coparceners are, yet they may not make partition by parol as coparceners may by the common law; and the reason was, because the Statute doth not extend to any partition, but by a writ *de partitione facienda* only, but leaves all other partitions as they were before. And it was said, if there are two joint tenants with warranty, and the one disseises the other, and the disseisee brings an assize, and on his prayer has judgment to recover in severalty, in this case the warranty is gone; for although he has partition by judgment, yet he who is bound by the warranty is not party, or privy, or consenting to it, as he is when the partition is made by force of the Act of Parliament. Note reader, although some books are, that judgment shall be given to hold in severalty in the case of joint tenants, as 10 E. 3, 40, and 10 Ass. p. 27, 17, yet I conceive it will be hard in law to maintain the judgment; for 1, the plaintiff in assize ought to recover according to his plaint, and that is of nothing in several. 2. He ought to recover in the assize by view of the recognitors, and they have not the view of anything in severalty. 3. It will be to the plaintiff's prejudice as well for the survivor, as for warranty and the like: and therewith agreeth 21, 28 Ass. p. 35, where the case was adjudged not upon any opinion at the assizes but upon adjournment into the Common Pleas, and there adjudged that the plaintiff should recover generally, although the plaintiff himself prayed, that the judgment might be, that he should hold in severalty; for the prayer of the party will not alter the judgment of the law in such case.

EBERT *v.* WOOD.

SUPREME COURT OF PENNSYLVANIA. 1807.

[*Reported* 1 *Binn.* 216.]

THIS was a writ of error to the Common Pleas of Fayette County. Wood, the plaintiff below, brought an action of partition against Ebert, to which he pleaded *non tenent insimul*. At the trial of the cause, Wood gave in evidence a deed from a certain John Lea to himself for an undivided moiety of the premises in the declaration, and another deed from the same Lea to the defendant for the other undivided moiety. The defendant then offered parol evidence to show that Wood and himself, before the institution of the suit, had agreed to make partition, and that accordingly they met upon the ground, and with the assistance of a surveyor mutually employed by them, they ran and distinctly marked a line of partition, and actually made division of the land by each taking possession of the part allotted to him by the other, which had been so held in severalty ever since. This evidence was overruled by the court, and a bill of exceptions sealed, upon which the case was now argued.

Addison, for the plaintiff in error.

Ross, for the defendant in error.

TILGHMAN, C. J., delivered the opinion of the court.

The defendant in error brought an action of partition against the plaintiff in error, who pleaded *non tenent insimul*, and thereupon issue was joined. On the trial of the issue, Ebert offered to give evidence of a parol partition having been made by lines run and marked on the ground, and of possession having been taken by each party respectively according to this partition, and the part allotted to each having been held in severalty from the time of the partition to the time of bringing the action. This evidence was overruled by the court, upon which a bill of exceptions was taken, and whether the evidence was properly rejected is the question now to be decided.

The defendant in error contends that the evidence ought not to have been admitted: 1st, because the partition was made by parol; 2d, because if it had been in writing, it was not admissible on the issue joined, but ought to have been specially pleaded.

The first objection is founded on the Act of Assembly of 21st March, 1772, by which a writing is made necessary for the passing of any estate or interest in lands. This Act of Assembly, so far as respects the point under consideration, is in substance the same as the English Statute of Frauds and Perjuries, in the construction of which it has been determined that specific execution of a parol agreement shall be decreed in equity, where the agreement has been carried into effect in part only. This determination was founded on two principles: 1st, that where the

parties have acted upon their agreement, there is no danger of perjury in proving it; and 2d, because it is against equity that a man should refuse to perfect an agreement, from which he had derived benefit by an execution in part. Whether the Courts of Chancery have gone further than they ought, in thus indirectly giving efficacy to a parol agreement concerning land, we do not think ourselves at liberty now to inquire; because the principles I have mentioned have been adopted by this court, and long considered as the law of the land; and to question them now would shake many titles acquired under their authority. We therefore think ourselves bound to say that the evidence offered by Ebert ought to have been received, unless it was improper because not applicable to the issue joined, which is the second point for consideration.

The plaintiff below declared that he and the defendant held the land *together* and undivided; the defendant pleaded that they did not hold it *together;* and this was the point of the issue. Now what was the evidence offered by the defendant? Why, that he and the plaintiff had made partition, which was in direct affirmance of his plea, that they did not hold together; because if they held in severalty, they could not hold together. The court are of opinion, therefore, that the evidence offered by the defendant below ought to have been received, and that the judgment of the court of Fayette County was erroneous, and must be reversed.

Judgment reversed.[1]

DUNCAN *v.* SYLVESTER.

SUPREME JUDICIAL COURT OF MAINE. 1839.

[*Reported* 16 *Me.* 388.]

THIS was a petition for partition, wherein the petitioner claimed an undivided moiety of the land described in the petition, by virtue of a conveyance to him by Abner Knight, by deed dated July 19, 1819, conveying to him an undivided moiety of a tract of land of which the premises are part. The respondent denied the seisin of the petitioner.

At the trial before *Weston*, C. J., the respondent offered to prove, that one George Knight was tenant in common with the petitioner by virtue of a conveyance to him by the same Abner Knight, by a deed of warranty to him, dated July 18, 1817, of the other undivided half of the whole tract of land; that before July 18, 1823, George Knight and the petitioner made a division of the tract by metes and bounds, causing the land to be surveyed, but the division was merely by parol, no deeds being exchanged; that from the time of the division the petitioner and those claiming under him, and said George Knight and those claiming under him, have severally enclosed, occupied and improved the por-

[1] Accord., *Wood* v. *Fleet*, 36 N. Y. 499 (1867).

tion so set off to them respectively; that after the parol division, on July 18, 1823, the petitioner conveyed by deed of warranty to Jones Shaw, by metes and bounds, that portion of the land assigned to him by the survey and the parol petition as his half; that George Knight by his deed of warranty, June 20, 1833, conveyed to the respondent, by metes and bounds, that portion of the land which was so set off to him as his half, the last described tract being that of which partition is claimed in this process; and that since the conveyance by George Knight to the respondent, he had occupied the same openly, exclusively, and adversely to the petitioner and all others. A default was entered by consent, which was to be taken off, if in the opinion of the court, the evidence offered by the respondent would be sufficient to disprove the title of the petitioner, and the case stand for trial; otherwise judgment was to be rendered thereon.

Alden and *W. G. Crosby*, for the respondent.

Thayer, for the petitioner.

The opinion of the court was drawn up by

Weston, C. J. Assuming, for the purpose of determining its legal bearing, that the testimony offered by the respondent had been received, it appears that in July, 1819, one George Knight and the petitioner were tenants in common of a tract of land, of which the part described in the petition was understood to constitute one-half. In July, 1823, Knight and the petitioner caused the whole to be surveyed, and thereupon made a parol partition of the same by metes and bounds, in pursuance of which the parties and those claiming under them, have since occupied in severalty. In the same month of July, the petitioner conveyed, by a deed of warranty, the part assigned to him, to Jones Shaw, by metes and bounds. And in June, 1833, Knight also conveyed, by deed of warranty, the part assigned to him, by metes and bounds, to the respondent.

Neither the parol division, nor the subsequent corresponding occupation, nor the conveyance by each of the purparty assigned to him, operated as an effectual legal partition. Knight and the petitioner were seised *per mi et per tout*, and neither could invest the other with a separate title to a portion of the tract, without the formality of a deed. Each therefore may avoid the conveyance of the other, so that it may not interpose an obstacle to a just and equal partition. The tenancy in common embracing the whole tract, neither can, by his own act, exclude the other from any part of it. The petitioner has elected to avoid these proceedings, as far as he can do so, and he now claims partition of that which he had assigned by parol to his co-tenant.

The Statute authorizes partition to be made between those who are interested in the estate, and requires that all persons so interested should be notified. Knight has the same interest in the part, which the petitioner conveyed to Shaw, as the petitioner has in the part conveyed by Knight to the respondent; and both Shaw and the respondent are interested in that part of the estate, which may finally inure

to them, by force of the estoppel, arising from the deeds to them respectively. *Varnum* v. *Abbott et als.*, 12 Mass. R. 474. The respondent therefore having an interest in the land, and being privy in estate with Knight, has the same right to require that in the partition, the conveyance made by the petitioner should be disregarded, as the petitioner has to insist, that the conveyance made by Knight should be disregarded. The result is, that to make the partition legal and effectual, it should be made of the whole tract. And this is the reason why conveyances made by one co-tenant of a part in severalty, or of his interest in a part, may be avoided by the other co-tenants, when they take measures to effect partition at law. It is a violation of this principle to attempt to do it piecemeal. If two are tenants in common of an hundred acres of land, eligible for the site of a village, and each sells in severalty a few small house lots, constituting but a small proportion of what each is entitled to, it would be most inconvenient to sustain a separate petition for partition of each of these small lots. In such case the co-tenant, who petitions, should describe and aver his interest in the whole tract, and it would then be easy, as it would be most equitable and just, for the commissioners to make partition in such a way as to quiet the several grantees of each.

In *Miller* v. *Miller et al.*, 13 Pick. 237, it was decided by the court, "as a well-settled rule of law, that a tenant in common cannot enforce partition of a part of the common tenement, by metes and bounds." And we are of opinion, that the default must be taken off; and if the petitioner would maintain his process, he must so amend, as to include the whole tract. And if upon the appointment of the commissioners, they should find the former partition just and equal, as there is much reason to believe they will, they will make it in the same manner; the effect of which will be to vest the title in the respective grantees in severalty, by estoppel. And in this mode, the attempt of the petitioner, after having enjoyed and actually sold one half of the land, to get away a part of the residue may and should be defeated.[1]

[1] See *Porter* v. *Hill*, 9 Mass. 34 (1812). Contra, *Eaton* v. *Tallmadge*, 24 Wis. 217 (1869).

HALL *v.* PIDDOCK.

NEW JERSEY COURT OF CHANCERY. 1871.

[*Reported* 6 *C. E. Green*, 311.]

THE argument of this cause was had upon the bill, answer and proofs.

Mr. L. Zabriskie, for complainant.

Mr. G. A. Allen, for defendants.

THE CHANCELLOR. [HON. ABRAHAM O. ZABRISKIE.] The object of the bill in this case is to restrain partition proceedings commenced at law, and for an equitable partition in this court. Courts of law have jurisdiction of partition, as well as courts of equity, and when proceedings have been commenced at law the tribunal must retain the jurisdiction, and a court of equity will not interfere with it, unless such interference becomes necessary to protect some party thereto from fraud or wrong, or to secure to him some clear right which the law tribunal, from the manner of proceeding before it, cannot secure. For such purpose courts of equity, in exercising one of their principal functions, which is to remedy injustice occasioned by the strict rules of the law and the manner of proceeding in courts of law, will interfere to prevent a failure of justice and loss of rights.

In this case the complainant is tenant in common with the defendants, of an acre of land partly covered with buildings, situate in the county of Hunterdon, of which he owns three-fourths, and the defendants one-fourth. He claims that the buildings on the land were erected by those under whom he derives his title to the three-fourths, and that no part were erected by the defendants, or those under whom they obtained title.

The land belonged to Abraham Van Horn, who died in 1813. He devised it to his wife for life, and then to trustees for his son Matthew for his life, and at the death of Matthew to his four sons. The widow, Matthew, and three of his sons, conveyed the land to Abraham L. Voorhis, covenanting that the fourth son, George, should convey, when of age. Abraham L. Voorhis conveyed to D. Sanderson, who supposed that the title was perfect, and erected some buildings; Sanderson conveyed to John Hall, who supposed the title good, erected other buildings at considerable expense, and kept a hotel in the mansion-house built by him on the premises. There were no improvements on the premises when conveyed to Abraham L. Voorhis. In 1865 Matthew died, and on the 1st of April of that year his son George conveyed his fourth to the defendants. Hall, believing his title good, denied their right, which they established by bringing an ejectment. The defendants then applied to the Chief Justice for the appointment of commissioners to divide, under the Statute for the more easy partition of

lands; and such proceedings were had on that application, that an order for sale was made before the complainant had any knowledge of the proceedings. The regularity and legality of these proceedings are not denied.

These facts stated in the bill are all admitted by the answer, except the allegation of the complainant, that he and those under whom he claims supposed that they had good title to the whole of the premises. Upon this point much evidence has been taken. But as this question, in the view I take of the matter, is not material to the decision, I shall not review this evidence.

The rule that a tenant in common, who has made improvements on the land held in common, is entitled to an equitable partition, is well established, and is hardly disputed by counsel. The only good faith required in such improvements is that they should be made honestly for the purpose of improving the property, and not for embarrassing his co-tenants, or encumbering their estate, or hindering partition. And the fact that the tenant making such improvements knows that an undivided share in the land is held by another, is no bar to equitable partition. No other want of good faith is alleged or contended for by the defendants in this cause.

The peculiarities of an equitable partition are: that such part of the land as may be more advantageous to any party on account of its proximity to his other land, or for any other reason, will be directed to be set off to him if it can be done without injury to the others; that when the lands are in several parcels each joint owner is not entitled to a share of each parcel, but only to his equal share in the whole; that where a partition exactly equal cannot be made without injury, a gross sum or yearly rent may be directed to be paid for owelty or equality of partition, by one whose share is too large, to others whose shares are too small; and that where one joint owner has put improvements on the property, he shall receive compensation for his improvements, either by having the part upon which the improvements are, assigned to him at the value of the land without the improvements, or by compensation directed to be made for them.

The doctrine as to allowance for improvements is laid down by Justice Story in 1 Eq. Jur. § 655. It was recognized and acted on by the English Court of Exchequer in equity, in *Swan* v. *Swan*, 8 Price, 518; by the courts of New York, in *Town* v. *Needham*, 3 Paige, 553; *St. Felix* v. *Rankin*, 3 Edw. Ch. 323; *Conklin* v. *Conklin*, 3 Sandf. Ch. 65, and *Green* v. *Putnam*, 1 Barb. S. C. 500; and by this court, in *Brookfield* v. *Williams*, 1 Green's Ch. 341; *Obert* v. *Obert*, 1 Halst. Ch. 397, and *Doughaday* v. *Crowell*, 3 Stockt. 201.

In *Green* v. *Putnam* and *Brookfield* v. *Williams*, as in this case, the improvements were made by tenants in common in reversion during the previous life estate, which was held no bar to the allowance. And in *St. Felix* v. *Rankin*, *Conklin* v. *Conklin*, *Doughaday* v. *Crowell*, *Town* v. *Needham*, and *Brookfield* v. *Williams*, the complainants

were the parties claiming the allowance; and the allowance in these cases was not made, on the principle that a party asking relief in equity must first do what is equitable himself.

In making the partition in this case, if any can be made without great injury, the share or one-fourth to be allotted to the defendants must, if practicable, be set off from such part of the premises as has no improvements upon it or improvements of small value, and must be equal in value, without improvements, to one-fourth of what would be the value of the whole tract if it had no improvements upon it.

I am not satisfied from the evidence that this tract cannot be partitioned in this manner without great injury. The report of the commissioners appointed by the Chief Justice, and his action in confirming it, do not affect the question as *res adjudicata*. There the direction was to divide the whole premises, including the buildings, into four equal shares, and to assign one share by lot to each of the original tenants in common. I am satisfied that the premises could not be divided in that manner without great prejudice to the owners.

In examining the map annexed to the answer, I see that the northeast side fronts on a public road, and that on the northwest side of the tract a lot of ninety feet in front, with a depth which might be extended to two hundred and forty-five feet, being nearly one-half of the whole tract, has upon it only a granary and a shed. If these are of small value, their value might be disregarded by consent of the complainant; or if they are, as seems probable, buildings that can be removed without much loss, the right to remove them within a reasonable time might be reserved to the complainant. Coupled with the right in equity to allow a proper amount as owelty to equalize the partition, the evidence, which consists mainly of the opinions of witnesses without regard to these matters, does not convince me that a partition cannot be made without great injury.

It must, therefore, be referred to a master, to inquire into and report what would be the value of the whole tract if no improvements had been made upon it, and whether some part of the tract upon which no improvements have been made, or only improvements of small value, or that can be removed without material loss, cannot be set off, which will be, without improvements, equal in value to one-fourth of the value of the whole tract so ascertained; or whether such part cannot be set off in that manner by allowing or charging a reasonable sum for owelty; and whether such partition can be made without great prejudice to the owners of the property. And further to inquire into and report what is the present value of the premises with the improvements now standing on them, and also what has been the yearly net value of the premises from April 1st, 1865, when the defendants acquired their title to the one-fourth of it.

The defendants are entitled to such portion of the fourth of the net proceeds of the premises as belongs to the land. The proper way to ascertain and apportion that, is to give to the land such proportion

of the whole net yearly value, as the value of the land bears to the value of the whole premises, and to award one-fourth of it to the defendants.

If it shall appear that the premises cannot be divided in the manner directed, a sale must be ordered, and out of the proceeds of the sale a proper allowance made for the value of the improvements put upon the premises. The part of the proceeds to be allowed for the improvements must be such proportion as the value of the improvements, that is the excess of the value of the whole over the value of the land, bears to the value of the whole premises. The cases of *Conklin* v. *Conklin* and *Green* v. *Putnam*, are authority for such allowance out of the proceeds of the sale. In the last case, Justice Paige says: "Where one tenant in common lays out money in improvements on the estate, a court of equity will not grant a partition without first directing an account and suitable compensation, or else in the partition it will assign to such tenant in common that part of the premises on which the improvements have been made." And he directs a reference to inquire into the value of the buildings, and by whom paid for, and the amount of rents and profits, and by whom received, so that in case a sale should be ordered the proper allowance might be made.

The costs and expenses incurred by the defendants in the proceedings for partition begun by them, must be allowed out of the proceeds of sale; those proceedings were authorized by Statute, and were arrested by this court in order that more full equity might be done between the parties than could be done at law.[1]

MARKS *v.* SEWALL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1876.

[*Reported* 120 *Mass.* 174.]

APPEAL by David L. Marks from the decree of the Probate Court accepting the report of the commissioners appointed to make partition of the real estate of Moses B. Sewall, deceased, and confirming and establishing the partition.

At the hearing, before *Morton*, J., it appeared that Moses B. Sewall died in March, 1872, seised of the following among other parcels of real estate: A lot of vacant land on High Street, Boston, containing 4875 square feet, valued at $97,500, and a lot of land with buildings thereon on Monument Avenue, Charlestown, containing 3177 square feet, valued at $12,500.

[1] See *Scott* v. *Guernsey*, 48 N. Y. 106 (1871); *Ford* v. *Knapp*, 102 N. Y. 135 (1836).

Sewall left as his heirs four daughters, Mary F. Wales, wife of T. C. Wales, Annie L. Sewall, Linnie P. Sewall and Lilla M. Sewall, and two sons, Charles H. Sewall and George P. Sewall. Charlestown became a part of Boston, by annexation, on January 1, 1874.

Charles H. Sewall, on February 1, 1873, mortgaged to David L. Marks an undivided sixth part of the estate on High Street, Boston, the same being described by metes and bounds, as security for the payment of his note for $10,000, payable in five years from date, with interest quarterly, at the rate of seven per cent. per annum, and on the same date Marks executed an instrument recorded with the mortgage, wherein he recited the mortgage and declared that the note and mortgage were held by him in trust that Charles H. Sewall should pay him for the support and maintenance of Ellen M. Sewall, wife of Charles H., and daughter of said Marks, and for the support and maintenance of the infant daughter of Charles H. and Ellen M. Sewall, during their lives or the life of either of them, the sum of $700 per annum, in quarterly payments, and to secure to Mrs. Sewall the care and custody of their child.

On April 22, 1874, the Probate Court appointed commissioners to make partition of all the real estate of Moses B. Sewall, which any party interested should require to have included in the partition among the heirs aforesaid, and they reported as follows: "Whereas the said lot of land, situated on High Street in the city of Boston, is of greater value than the share of either party, and cannot in our judgment be divided without damage to the owners, and whereas George P. Sewall, Mary F. Wales, Annie L. Sewall, Linnie P. Sewall and Lilla M. Sewall are willing to have said lot of land set off to them together, and to pay to Charles H. Sewall such sum of money as may be awarded: we have set off and assigned to the said George P. Sewall, Mary F. Wales, Annie L. Sewall, Linnie P. Sewall and Lilla M. Sewall, the said lot of land situated on High Street, in said city of Boston, to be held by them in common, but separate from the share of Charles H. Sewall, and we have awarded that they shall pay to the said Charles H. Sewall the sum of $5833.33 to make the partition just and equal. And we have set off and assigned to the said Charles H. Sewall said lot of land, situated in that part of said city of Boston which was recently the city of Charlestown, Charles H. Sewall to receive from the said George P. Sewall, Mary F. Wales, Annie L. Sewall, Linnie P. Sewall and Lilla M. Sewall, the sum of $5833.33, to make the partition just and equal." Their report was accepted, November 11, 1874, and the partition confirmed and established. From this decree David L. Marks appealed, and assigned the following reasons:

"Because the decree did not set off to said Marks his interest in the High Street estate, or award payment in money therefor; and because the money awarded by the commissioners had not been paid to said Marks, he being entitled thereto, or secured to his satisfaction, or to the satisfaction of the Probate Court."

It appeared that the heirs to whom the High Street estate was set off were able to pay the value of Charles H. Sewall's interest therein, in case partition of that estate by itself should be made, the entire estate set off to them, and it should be awarded that the value of Charles H. Sewall's interest should be paid in money. Further it appeared that Charles H. Sewall had refused and still refused to agree to the substitution of any other security on the note given by him to Marks.

Upon these facts the judge affirmed the decree of the Probate Court, and upon request of Marks, reported the case for the consideration of the full court.

R. M. Morse, Jr., for the appellant.

E. L. Barney, for Charles H. Sewall.

J. R. Bullard, for the other appellees.

DEVENS, J. It is conceded, as a general proposition, that a tenant in common, as against his co-tenants, cannot convey his interest in a specified parcel of the lands held in common. *Adam* v. *Briggs Iron Co.*, 7 Cush. 361, and authorities cited. It is, however, argued that, as when the conveyance was made by Charles H. Sewall, it purported to convey his interest in the High Street estate, which was all the land then lying in the county of Suffolk, and that as it was then in the power of the judge of probate to have issued a separate warrant and caused a separate partition to have been made of the lands lying in that county, (Gen. Sts. *c.* 136, § 50,) the conveyance may here be treated as valid against the co-tenants. But it was in the power of the Probate Court then, by one commission, to have made partition of all the real estate lying within the State, (Gen. Sts. *c.* 136, § 48,) and at the time when the commission was actually issued, both parcels which were to be divided had, by the annexation of territory of Charlestown, become a part of the county of Suffolk. The mere fact that, but for the occurrence of this latter contingency, the Probate Court could have divided the lands of the deceased by separate commissions, does not entitle the appellant to claim that he would then have had, or that he now has, a right to have the High Street estate separately divided.

If, as against the co-tenants, the mortgage made by Charles H. Sewall is invalid, the court should not refuse to confirm the decree for partition. While the court may, for sufficient reason, set aside the return of the commissioners and recommit the case, (Gen. Sts. *c.* 136, § 74,) yet the reason for so doing should be because there is some objection to the return as made, and not because one might be made which would facilitate other proceedings before another tribunal by the appellant against Sewall. If, treating the mortgage as invalid, the partition is a fair and just one, it should be confirmed.

Nor, if the partition is thus confirmed, is the appellant entitled to have the sum of $5833.33 (which is the amount in money to be paid to Charles H. Sewall) first paid or secured to him. It is a part indeed of the proceeds of that portion of his inheritance which Sewall assumed

to convey to the appellant; but if the mortgage be invalid as to them, the co-tenants have the right here to have the partition confirmed without regard to any relations which may exist between Sewall and the appellant. *Decree affirmed.*[1]

EMSON *v.* POLHEMUS.

New Jersey Court of Errors and Appeals. 1877.

[*Reported* 28 *N. J. Eq.* 439.]

The respondent, Polhemus, and one Hodson were tenants in common of a tract of woodland, of which they made a voluntary partition, by deeds dated August 21st, 1865. These deeds were duly recorded. Before this parting of the property, the appellant, Emson, had recovered a judgment against Hodson, which became a lien on the premises in question; on which judgment, and long subsequent to the partition, that is, on the 8th of August, 1871, a writ of *fieri facias* was issued, and by force of which the sheriff sold and conveyed to Emson the undivided interest of Hodson in the tract. Having obtained a sheriff's deed, Emson took proceedings, under the Act "For the more easy partition of lands held by coparceners, joint-tenants, and tenants in common," for the partition of the premises between himself and the respondent. The latter thereupon filed the bill in this suit to restrain such proceedings; on the final hearing this injunction was made perpetual.

Mr. Joel Parker, for appellant.

Mr. James Wilson, for respondent.

The Chief Justice. [Hon. Mercer Beasley.] In order to affirm the decree in this case it is necessary to maintain the general proposition, that after a judgment has become a lien on the undivided share of a tenant in common in land, such tenant in common, in concert with those who share the estate with him, can make a voluntary partition that will, if fairly made, be valid with respect to the lien of such judgment.

I have carefully examined the cases which have been cited in support of the proposition thus stated, and I do not find that any of them can be regarded as a precedent in its favor. The nearest approach to adjudications upon the point are those holding that by force of a voluntary partition made by the husband, the right of dower of the wife will be contracted to the parcel of land so set off to him. But these decisions rest, as it seems to me, on grounds peculiar to themselves. In this particular it is not easy to separate the interests of the husband and wife, they are so nearly identical. If the husband acquires by the partition an advantageous allotment, both he and his wife are

[1] So *Stewart* v. *Allegheny Nat. Bank*, 101 Pa. 342 (1882). But see *Whitton* v. *Whitton*, 38 N. H. 127 (1859).

equally gainers, and there is a parity of loss to each, if the share set off to the husband be less than his due. The right of the wife is inchoate and contingent, so that the husband cannot prejudice, either from his folly or his fraud, her interest, without, to a greater degree, sacrificing his own. It is not to be wondered at, therefore, that courts have maintained that the act of the husband, in taking to himself his share of undivided land, shall bind the wife so as to attach her dower exclusively to the part so taken. The right of partition is paramount to the right to dower; and when the husband settles the extent of his own right, there seems nothing inconsistent with principle or justice in permitting him to settle, by the same act, the extent of the right of his wife. The judgment, therefore, in *Totten* v. *Stuyvesant*, 3 Edw. Ch. 500, which maintains this doctrine, is, I think, founded on correct principles. But I also think that it was held with equal propriety, in *Bank* v. *Hanna*, 6 Ind. 20, that where a husband, being a co-tenant, conveyed his estate by a deed in which the wife did not join, and the grantee, with the other co-tenants, made a voluntary partition, such distribution of the land did not bind the wife after the death of her husband.

But the relation of debtor and creditor is not, in a matter of this kind, to be likened to that of husband and wife, for while the interests of the latter are concurrent, those of the former are adverse; and to give to the debtor the status of the husband in this respect, so that he can affect his creditors, would be both unscientific and impolitic.

A creditor by his judgment, and a mortgagee by his deed, gets a lien on an undivided interest in the land of his debtor, which gives him a fixed and immediate interest, and which is in all respects paramount, as far as it extends, to the right of the debtor in the property. It is obviously undeniable that these lienholders will be materially affected by the allotment of the particular part of such property to which their lien is to be affixed by the law. If the ascertainment of such part be made by an appeal to the judicial power, such creditors have satisfactory guarantees that the division of the land will be fair and just; and hence the propriety of the provision of the Statute of this State, that if, at the time of making partition, a lien exists "upon the undivided estate of any owner, by judgment, decree, mortgage or otherwise, such lien shall thereafter be a lien only on the share assigned or allotted to such owner." Rev. p. 804, § 36. And it should be remarked, in passing, that the presence in the Statute of a direction of this kind, appears to intimate that an express statutory declaration was necessary to affect the claims of the lienholders, even by a judicial division of the land among the owners. And the question, therefore, is forcibly presented, why should this same force be imparted to the self-directed act of the debtor? In such case what assurance has the creditor that his rights will be adequately protected?

The general rule is, as was said in *Agar* v. *Fairfax*, 17 Ves. 543, that partition never affects the rights of third parties; and the more I

have reflected on this subject, the less I have seen in favor of the proposal to affect the mortgagee or judgment creditor by the voluntary partition of the debtor. I can yield no force at all to the suggestion that "the fact that the parties to the partition may be compelled to partition by legal proceedings, is a sufficient ground for upholding such a voluntary partition as would have been made at law." Such a rule, and the reasoning that supports it, would validate a partition, if a fair one, which should be made by a single tenant in common as against his co-tenants. Nor can I perceive why, because an infant to a certain extent, and retaining a qualified power when of age of repudiating the act, may bind his own interest by joining in a partition, a tenant in common should be permitted by his act, not only to affect his own interest, but likewise the interest of his non-assenting creditors. The terms of these several propositions appear to my mind to have nothing in common, and consequently the legitimate deduction that may be made from the one is no warrant for drawing a similar conclusion from the other.

The principal argument, however, which is urged to uphold the power of the debtor to make a partition by his private action that will be obligatory on his creditor who holds a lien on the land is, that if the partition thus made, is not fair, it can be set aside. But this contention will, upon examination, be found to be destitute of all real force. It substitutes a remedy for a wrong committed, in the place of a remedy against the commission of such wrong. The safeguard against an unfair separation of the rights of the co-tenants which in a judicial procedure is provided, is the substitution of the judgment of discreet and unprejudiced men, instead of the notions of the owners of the property. The proposed rule would take away from the creditor this safeguard, and in lieu of it place in his hands the cumbersome privilege of overhauling, if he can show unfairness, the act of the co-tenants. All persons will see that by such substitution, the creditor is placed at disadvantage, and has, in reality, lost a valuable right. The fact is, the creditor should have both rights, viz.: the right to a partition by unprejudiced persons, and the right to litigate an unfair partition, even if made by such persons. But the contention in question deprives him of the former of such rights, and gives him no equivalent.

There is a further objection of magnitude. The rule proposed would leave the lienholder subject to the caprice or folly of his debtor in the act of agreeing to partition. When a tenant in common is competent to contract, his agreements with his co-tenants respecting the partition of his land are as binding upon him as are his contracts on any other subject. In the absence of fraud, an unequal partition assented to by such tenant is not, in legal estimation, an unfair one that will be set aside. If, by the exercise of a superior judgment, certain of the tenants in common gain an advantage, the proceeding, on that account, is not invalid. "If coparceners, joint-tenants, or tenants in common, seised in fee simple, make partition, it is good forever, though the value of the different shares taken in severalty be unequal." Such is the rule

as propounded by Allnatt, p. 30. The consequence is, that the lienholder, if the rule contended for is to prevail, will, in place of the discretion of men selected judicially, be thrown on the judgment of the debtor, and will be bound by the exercise of such judgment, in the absence of actual fraud, whether such debtor be a frivolous person or a man of sense. In the absence of controlling authority it is not perceived why the judgment creditor should be placed in a position so unfavorable.

There are many other objections which, on reflection, will present themselves. A partition would often be of a kind which, while it would be perfectly fair and just between the parties, and which, therefore, could not consistently with established rules be set aside, yet would be quite ruinous to the interests of the creditor. For example, in a case where the co-tenants agree to divide between themselves the rooms of a house: such distribution is entirely legal, and if the power to make a voluntary partition exists at all, could not be impeached; and yet such an interest, regarded as a salable article under an execution, might be of little value. Conceding to the judgment debtor the capacity to make voluntary partition, what is to be done with arrangements of this nature? It is obvious they would be valid in law, and they would have to be sustained against the judgment creditor or mortgagee.

So, I think, this power of partition, if it existed, would often be turned to purposes of fraud and vexation. Suppose a creditor has advertised for sale, by force of his judgment and execution, the undivided interest of his debtor in certain lands, and on the eve of such sale he should ascertain that his debtor has made a division of such lands with the co-tenants, which he deems unfair — what is his remedy? Certainly a most oppressive and inefficient one. All that he could do would be to stop his proceedings under his execution, and file his bill in equity to test the fairness of such partition. All persons can see that such a remedy would not often be resorted to unless where the unfairness was very gross and the consequent loss to the creditor of magnitude. By such a practice ordinary frauds could be perpetrated with absolute impunity. I have little doubt that if it were known that debtors have the power which is claimed by the respondents, that these partitions, unfair upon their very face, would oftentimes be made in order to procure a virtual stay of execution, by driving creditors, who were about selling under their judgments, into a court of equity to obtain a redivision of the property before exposing it for sale.

All these evils and iniquities will be avoided by holding that the debtor, after mortgage or judgment, cannot make a voluntary partition which will bind such lienholders. Such a doctrine imposes no hardship on the debtor and his co-tenants. If they desire a separation of their interests they can pursue the legal formulary; that method is simple, expeditious, and inexpensive, and by its use the interest of all parties, those of mortgagees and judgment creditors, will be protected.

It seems to me of importance to establish this as the legal course of practice in this State; and I shall, consequently, vote to reverse the decree in the present case.

For reversal — Beasley, C. J., Dalrimple, Depue, Scudder, Van Syckel, Woodhull, Lathrop — 7.

For affirmance — Dixon, Knapp, Clement, Lilly — 4.

Joint Ownership in Personal Property. — Personal property may be held jointly or in common. There is of course no interest corresponding to coparcenary in real estate. A conveyance of personal property to two or more simply makes them joint owners; but there are special rules as to partners and the owners of ships. The modern Statutes which declare that a conveyance to two or more shall presumptively be taken to create a tenancy in common, have sometimes no application to personal property.

Each joint owner or owner in common of a chattel personal has a right to the possession, and no action of trespass or trover lies against him at the suit of his co-owner for taking or keeping possession of it.

But I. It seems that trespass will lie by an owner in common of a chattel personal against his co-tenant for the destruction of the chattel. See Co. Lit. 200 a.

II. Trover lies at the suit of an owner in common of a chattel personal against his co-owner for so dealing with the chattel as to render any future use of the chattel by the plaintiff impossible. See, for example, *Needham* v. *Hill*, 127 Mass. 133 (1879). The cases are collected Freem. Co-ten. §§ 306, 307, 312–318.

III. Whether a sale of a chattel personal by an owner in common, who represents himself as the sole owner and professes to pass the title to the whole chattel, be a conversion, is a question which has been much mooted. The weight of authority in the United States is in the affirmative. See the cases collected in Freem. §§ 308–311.

IV. If there are owners in common of chattels of the same quality and readily divisible, such as grain, it is commonly held in America that one of them may claim the right to take his share, and if he is refused, may maintain trover, — see 2 Kent Com. (12th ed.) 365, note 1; Freem. § 252; *Lobdell* v. *Stowell*, 51 N. Y. 70 (1872), — or even replevin, *Young* v. *Miles*, 20 Wis. 615 (1866); *Piazzek* v. *White*, 23 Kans. 621 (1880).

There is no mode of obtaining partition of chattels personal at law, unless replevin of grain, &c. (see IV. *supra*), be so considered. A bill in equity for partition of personal chattels is allowed at the present day in many of the States; the first time such a bill was sustained seems to have been *Smith* v. *Smith*, 4 Rand. 95 (1826). See Freem. § 426.

BOOK XIII.

CURTESY AND DOWER.

CHAPTER I.

CURTESY.

Lit. § 35. Tenant by the curtesy of England is, where a man taketh a wife seised in fee simple or in fee tail general, or seised as heir in tail especial, and hath issue by the same wife male or female born alive, albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the law of England. And he is called tenant by the curtesy of England, because this is used in no other realm but in England only.

And some have said, that he shall not be tenant by the curtesy, unless the child, which he hath by his wife, be heard cry; for by the cry it is proved, that the child was born alive. Therefore *quære.*

Co. Lit. 29 a. "Taketh a wife seised." And first of what seisin a man shall be tenant by the curtesy. There is in law a twofold seisin, viz. a seisin in deed, and a seisin in law, whereof more shall be said sect. [448], and 681. And here Littleton intendeth a seisin in deed, if it may be attained unto. As if a man dieth seised of lands in fee simple or fee tail general, and these lands descend to his daughter, and she taketh a husband and hath issue, and dieth before any entry, the husband shall not be tenant by the curtesy, and yet in this case she had a seisin in law; but if she or her husband had during her life entered, he should have been tenant by the curtesy. A man seised of an advowson or rent in fee hath issue a daughter who is married, and hath issue, and dieth seised, the wife, before the rent became due or the church became void, dieth, she had but a seisin in law, and yet he shall be tenant by the curtesy, because he could by no industry attain to any other seisin. *Et impotentia excusat legem.*[1] But a man shall not be tenant by the curtesy of a bare right, title, use, or of a reversion, or remainder expectant upon any estate or freehold unless the particular estate be determined or ended during the coverture.

Co. Lit. 29 b. If lands be given to a woman and to the heirs males of her body, she taketh a husband, and hath issue a daughter and

[1] See *Eager* v. *Furnivall*, 17 Ch. D. 115 (1881).

dieth, he shall not be tenant by the curtesy; because the daughter by no possibility could inherit the mother's estate in the land; and therefore where Littleton saith, issue by his wife male or female, it is to be understood, which by possibility may inherit as heir to her mother of such estate. . . . If a man seised of lands in fee hath issue a daughter, who taketh husband and hath issue, the father dieth, the husband enters, he shall be tenant by the curtesy, albeit the issue was had before the wife was seised. And so it is albeit the issue had died in the lifetime of her father before any descent of the land, yet shall he be tenant by the curtesy. If a woman seised of lands in fee taketh husband, and by him is big with child, and in her travail dieth, and the child is ripped out of her body alive, yet shall he not be tenant by the curtesy, because the child was not born during the marriage, nor in the life of the wife, but in the mean time her land descended, and in pleading he must allege, that he had issue during the marriage.

"Born alive." If it be born alive it is sufficient, though it be not heard cry; for peradventure it may be born dumb. And this is resolved clearly in *Paine's Case*, *ubi supra*. For the pleading (as hath been said) is, that during the marriage he had issue by his wife, and upon that point the trial is to be had, and upon the evidence it must be proved that the issue was alive, for *mortuus exitus non est exitus*, so as the crying is but a proof that the child was born alive, and so is motion, stirring, and the like.

Co. Lit. 30 a. By the custom of gavelkind a man may be tenant by the curtesy without having of any issue.

"Albeit the issue after dieth or liveth." And therefore if a woman tenant in tail general taketh a husband, and hath issue, which issue dieth, and the wife dieth without any other issue, yet the husband shall be tenant by the curtesy, albeit the estate in tail be determined, because he was entitled to be tenant *per legem Angliæ* before the estate in tail was spent, and for that the land remaineth. But if a woman maketh a gift in tail, and reserve a rent to her and to her heirs, and the donor taketh a husband and hath issue, and the donee dieth without issue, the wife dieth, the husband shall not be tenant by the curtesy of the rent, for that the rent newly reserved is by the act of God determined, and no state thereof remaineth. But if a man be seised in fee of a rent and maketh a gift in tail general to a woman, she taketh husband and hath issue, the issue dieth, the wife dieth without issue, he shall be tenant by the curtesy of the rent, because the rent remaineth. The diversity appeareth.

"If the wife dies the husband shall hold the land, &c." Four things do belong to an estate of tenancy by the curtesy, viz. marriage, seisin of the wife, issue, and death of the wife. But it is not requisite that these should concur together all at one time. And therefore, if a man taketh a woman seised of lands in fee, and is disseised, and then have issue, and the wife die, he shall enter and hold by the curtesy. So if he hath issue which dieth before the descent, as is aforesaid.

And albeit the state be not consummate until the death of the wife, yet the state hath such a beginning after issue had in the life of the wife as is respected in law for divers purposes.

First, after issue had, he shall do homage alone, and is become tenant to the lord, and the avowry shall be made only upon the husband in the life of the wife, as shall be said hereafter when we come to the apt place. Secondly, if after issue the husband maketh a feoffment in fee, and the wife dieth, the feoffee shall hold it during the life of the husband, and the heir of the wife shall not during his life recover it in *sur cui in vita ;* for it could not be a forfeiture, for that the estate at the time of the feoffment was an estate of tenancy by the curtesy initiate and not consummate. And it is adjudged in 29 E. 3, that the tenant by the curtesy cannot claim by a devise, and waive the state of his tenancy by the curtesy, because, saith the book, the freehold commenced in him before the devise for term of his life.

Lit. § 52. And *memorandum,* that in every case where a man taketh a wife seised of such an estate of tenements, &c. as the issue, which he hath by his wife, may by possibility inherit the same tenements of such an estate as the wife hath, as heir to the wife ; in this case, after the decease of the wife, he shall have the same tenements by the curtesy of England, but otherwise not.

Co. Lit. 40 a. If a man taketh a wife seised of lands or tenements in fee, and hath issue, and after the wife is attainted of felony so as the issue cannot inherit to her, yet he shall be tenant by the curtesy, in respect of the issue which he had before the felony, and which by possibility might then have inherited. But if the wife had been attainted of felony before the issue, albeit he hath issue afterward, he shall not be tenant by the curtesy.

Lit. § 90. Note, none shall do homage but such as have an estate in fee simple, or fee tail, in his own right, or in the right of another. For it is a maxim in law, that he which hath an estate but for term of life, shall neither do homage or take homage. For if a woman hath lands or tenements in fee simple, or in fee tail, which she holdeth of her lord by homage, and taketh husband, and have issue, then the husband in the life of the wife shall do homage, because he hath title to have the tenements by the curtesy of England if he surviveth his wife, and also he holdeth in right of his wife. But if the wife dies before homage done by the husband in the life of his wife, and the husband holdeth himself in as tenant by the curtesy, then he shall not do homage to his lord, because he then hath an estate but for term of life.

Co. Lit. 67 a. "He which hath an estate but for term of life." A parson or vicar of a church, that hath a qualified fee, and yet to many intents upon the matter but an estate for life, can neither receive homage nor do homage, as a bishop, an abbot, or any such like, that hath a fee absolute may. So if a man and his wife be seised in fee of a seigniory in the right of his wife, the husband shall not receive homage

alone, but he and his wife together. But if the husband in that case hath issue by his wife, then he shall receive homage alone during the life of his wife, and the reason is, because he by having of issue is entitled to an estate for term of his own life, in his own right, and yet is seised in fee in the right of his wife, so as he is not a bare tenant for life. But if his wife die, then he hath only but an estate for life, and then he cannot receive homage. Yet tenant for life or years of a seigniory shall have ward, marriage, and relief, and shall suppose that the tenant died in the fealty of the pl. *Fieri possunt homagia libero homini tam masculo quam fœminæ, tam majori quam minori, tam clerico quam laico.*

"And have issue, then the husband in the life of the wife shall do homage." The reason hereof is rendered before, and also that after the death of his wife he being but a bare tenant for life shall do no homage; for regularly it is true, that he that cannot receive homage in respect of the weakness of his estate in the seigniory, shall not do homage, if he hath a like estate in the tenancy.

DE GREY *v.* RICHARDSON.

Chancery. 1747.

[*Reported* 3 *Atk.* 469.]

The first bill was brought by the executors of Hardwicke Sewell to establish his will, and the trusts thereof. The second bill states, that by virtue of a settlement made in 1699, on the marriage of the father and mother of Hardwicke Sewell, and in 1703, the estates therein mentioned descended on him as their son and heir in tail, that on the 27th of November, 1742, he died without issue, and upon his death the estates descended on the plaintiff's wife Alice the sister of Hardwicke Sewell as heir in tail general under the settlement: Alice died the 19th of August, 1743, leaving two children, the defendants Hardwicke Sewell Richardson and Alice Richardson, and the plaintiff insists that he is entitled as tenant by the curtesy to the possession of these estates, his wife being in her lifetime, and at her death, seised thereof, and leaving such issue as aforesaid, and therefore prays to be let into the possession thereof, and to receive the rents for his life.

Hardwicke Sewell Richardson, plaintiff in the third bill, and son of Plampin Richardson, insists that Alice his mother was never seised of these estates, nor did she, or her husband Plampin Richardson in her right, take possession thereof, or receive any part of the rents, and therefore he is not entitled to be tenant by the curtesy: Prays an account of the rents and profits of the estates from the executors of Hardwicke Sewell, and that they may be placed out at interest till he comes of age.

The rents under the leases were payable at Michaelmas and Lady-day, but the tenants being greatly in arrear at the death of Hardwicke Sewell, Alice Richardson, the sister of Hardwicke Sewell, did not receive any of the Lady-day rent notwithstanding she lived four months beyond that time, nor did any other person receive it in the lifetime of Alice.

Mr. Wilbraham, counsel for Plampin Richardson.

Mr. Noel and *Mr. Weldon*, counsel for Hardwicke Sewell Richardson, the son.

Lord Chancellor [Hardwicke]. This is a matter of great consequence to husbands, as most of the lands in England are let out upon leases for years, and tenants extremely backward in paying their rents, and as a wife may have a right for a year or two, or no actual entry made, it would be hard for this reason to prevent a tenancy by the curtesy.

The question is a question of law, whether where lands on which there are leases for years existing, and a rent incurred, descend on the wife as tenant in tail; and she survives three months after the rent-day incurred, but has made no entry, nor was there any rent paid during her life, is such a possession of the wife as will make the husband *tenant by the curtesy?*

It has been insisted on one hand, that there must be a seisin in deed.

And on the other hand, that if the seisin in deed cannot be attained unto, the law excuses it; and therefore the case put by Lord Coke will afford a good deal of argument on the present case: "A man seised of an advowson or rent in fee hath issue a daughter, &c." Co. Lit. 29 a.

To go by steps, here is an estate of which the brother was seised in tail, descends upon the sister in tail general; the possession of the lessee was the possession of the brother, and he undoubtedly died seised, afterwards the sister became seised.

Supposing she had died before Lady-day, I should have had no doubt but the husband would have been tenant by the curtesy, because he could do nothing till rent-day came; for the law never requires a man to become a trespasser.

Lord Coke says in his comment on the 8th section of Littleton, 15 a: "If the father maketh a lease for years, and the lessee entereth and dieth, the eldest son dieth during the term before entry or receipt of rent; the younger son of the half blood shall not inherit, but the sister, because the possession of the lessee for years is the possession of the eldest son, so as he is *actually seised* of the fee simple, and consequently the sister of the whole blood is to be heir."

There is not a stricter case than this of *possessio fratris*, and yet you observe Lord Coke says, that if the eldest son die before entry, or receipt of rent, the sister shall inherit.

Actually seised is the same thing as seisin in deed; then why was not the wife in this case actually seised?

Mr. Noel in answer to this refers to the next page in Co. Lit. 15 b:

"What then is the law of a rent, advowson, or such things as lie in grant? If a rent or an advowson do descend to the eldest son, and he dieth before he hath seisin of the rent, or present to the church, the rent or advowson shall descend to the youngest son, for that he must make himself heir to his father: and therefore," says Mr. Noel, "there ought to have been *an actual seisin* of the rent, or Plampin Richardson could not be entitled to be *tenant by the curtesy*."

But the consequence I draw from it is different from what Mr. Noel does; for in the same section he saith, "This case differeth from the case of the tenancy by the curtesy; for there, if the wife dieth before the rent-day, or that the church become void, because there was no laches or default in the husband, nor possibility to get seisin; the law, in respect of the issue begotten by him, will give him an estate by the curtesy of England;" so that you observe the case of tenant by the curtesy is considered more favorably than a *possessio fratris*, for a *possessio fratris* as *facit sororem esse hæredem* requires some act to be done to make her heir.

Then all that remains in the present case is the laches in not receiving or distraining for the rent that became due at Lady-day.

The receipt of rent would have amounted to evidence of an actual seisin, and if the trustees under the will of the brother had received any rent in the lifetime of the wife, would have been a material objection; but no rent has been received that has accrued after the death of the brother either by the wife or any person against her; and therefore is a very strong case, to make the husband a tenant by the curtesy, as the possession of the lessee was the possession of the wife, and there could be no other without making the husband a trespasser.

Lord Hardwicke "declared the will of Hardwicke Sewell to be well proved, and that it ought to be established, and the trusts thereof performed, and decreed the same accordingly: and as to the testator's real estate he ordered the master to inquire what part thereof was comprised in the two settlements dated the 26th of February, 1699, and the 13th of August, 1703, and what particular parts of the testator's estate descended to Alice, the late wife of the defendant Plampin Richardson, the mother of the plaintiff Hardwicke Sewell Richardson, in tail, and what particular parts of the estate passed by the testator's will to his trustees; and also to inquire what parts of the lands which descended to the defendant Plampin Richardson's wife in tail were at the testator's death standing out on any lease or leases for years, and of what particular part of such estate the testator died seised in actual possession, and to state the same; and his Lordship doth declare that he is of opinion that the defendant Plampin Richardson is entitled to be tenant by the curtesy of all such lands as descended to his late wife in tail, whereof any leases for years were existing at the testator's death, which continued till the death of his wife; but that he is not entitled to be tenant by the curtesy of any part of such lands, whereof no such leases for years were existing and continuing as aforesaid."

BUCKWORTH *v.* THIRKELL.

KING'S BENCH. 1785.

[*Reported* 3 *B. & P.* 652 *n.*]

THIS was a case reserved from the Cambridge Assizes. The form of the action was replevin.

Devise to trustees and their heirs to receive the rents and profits of a certain estate, and apply them for the maintenance of Mary Barnes, till she arrived at the age of 21 years, or till she married; and on her arriving at such age or marrying, to the use of Mary Barnes, her heirs and assigns, but in case said Mary should die before the age of 21 years, and without leaving issue, remainder over. Mary married and had a child, which child died, and then Mary died before she arrived at the age of 21 years.

The question was, Whether Mary's husband was entitled to be tenant by the curtesy.

Wood and *Le Blanc*, for the plaintiff.

Whitechurch and *Wilson*, for the defendant.

LORD MANSFIELD. Tenancy by the curtesy existed before the Stat. *de Donis*, and the definition of it is, that the wife must be seised of an estate of inheritance, which by possibility her issue by the husband may inherit, and there must be issue born. Estates at that time were of two sorts, conditional or absolute, and curtesy applied to both equally. I cannot agree with the argument, that on the performance of the condition by birth of a child the estate became absolute; it was so by a subtilty in odium of perpetuity, and for the special purpose of alienation, but for no other. It otherwise reverted to the donor on failure of the issue according to the original restriction. At common law the only modification of estates was by condition. The Statute of Uses introduced a greater latitude of qualification, but there arose a great dread of letting in perpetuities by means of the extensive operation of that Statute, and in the time of Elizabeth and James many cases were decided with a view to prevent that effect; with this view it was allowed to bar contingent remainders before the person who was to take came into *esse*; others were held to be too remote in their creation. The cases proceeded in that view too far, and estates were too much loosened, and it became necessary to restrain them again; and in the time of the troubles, eminent lawyers who were then chamber counsel, devised methods which on their return to Westminster Hall, they put in practice, such as interposing trustees to preserve contingent remainders. It is not of long date that the rules now in use have been established. I remember the introduction of the rule which prescribes the time in which executory devises must take effect to be a life or lives in being, and 21 years afterwards. It is contended that this is a

conditional limitation. It is not so, but a contingent limitation; all the cases cited go upon the distinction of there being conditions and not limitations. During the life of the wife she continued seised of a fee simple to which her issue might by possibility inherit. I am of opinion, that the defendant is entitled to be tenant by the curtesy.

The rest of the court assenting,

Judgment for the defendant.[1]

JACKSON d. BEEKMAN *v.* SELLICK.

SUPREME COURT OF NEW YORK. 1811.

[*Reported* 8 *Johns.* 262.]

THIS was an action of ejectment, for land in the Minisink Angle, in Orange County. The cause was tried at the Orange Circuit, in September, 1810, before *Mr. Justice Van Ness*. A verdict was taken, by consent, for the plaintiff, with liberty to the defendant to move to set it aside, on a case containing the following facts: —

A large tract of land, including the premises in question, was granted by letters patent, dated the 28th August, 1704, to Matthew Ling and twenty-two others, among whom was John Parson, to be held, one twenty-third part thereof, to each of the patentees, in fee-simple. Parson, by deed, dated 26th November, 1706, reciting the patent, conveyed his twenty-third part to Henry Van Ball, with covenant of warranty. A partition was made by commissioners, under the Colony Act of the 7th Anne, on or about the 31st March, 1715, of that part of the tract called the Angle, of which the premises in question are part, and by which the premises in question were allotted to Henry Van Ball, for his share thereof, in severalty. Van Ball, being owner of the premises, and other lands, made his will, the 17th April, 1711, and authorized his executors to sell his real estate, and distribute the proceeds among the children of his four sisters, Maria, the wife of Isaac Depeyster, Margaret, the wife of Nicholas Evertson, Helena, the wife of Gualterius Dubois, Rachel Bayard, the widow of Petrus Bayard, and to place the share of Hannah, his remaining sister, at interest during her life, for her use, and after her death, to divide it among the other heirs. The testator died without issue. Rachel Bayard, one of his sisters, married Henry Willman, whom she survived; and she, Rachel Willman, after the death of her husband, about the 14th June, 1746, by her last will, devised the half of all her real estate to her son, and the other half to her daughter, Elizabeth Willman, who married Vincent Matthews, by whom she had one child, a daughter, born in 1756, who married Theophilus Beekman, in January, 1783. Hannah Van Ball, the unmarried sister of Henry Van Ball, died intestate, and without issue, in the lifetime of her sister Rachel. Elizabeth, the wife of Vincent Matthews,

[1] *Hatfield* v. *Sneden*, 54 N. Y. 280 (1873), *accord*.

died the 18th August, 1764, and Vincent Matthews died the 24th May, 1784. Theophilus Beekman died about the 1st January, 1807, and his widow, Elizabeth Beekman, is the lessor of the plaintiff.

No evidence was offered that Rachel, the sister of Henry Van Ball, or her daughter Elizabeth, the wife of Matthews, or Theophilus Beekman and Elizabeth his wife, or either of them, ever entered into the premises in question, or had the actual possession thereof; but the same continued *vacant*, from the time of issuing the patent, until in the year 1772, when those under whom the defendant holds, went into possession, under conveyances, which they considered valid, and which were adverse to the title of the lessor, above stated; and the premises have been held by the defendant, and those under whom he claims, ever since 1772, adversely to all others.

S. Jones, jun., for the defendant.

P. W. Radcliff and *B. D. Ogden*, contra.

KENT, C. J., delivered the opinion of the court. The defence, in this cause, turns wholly upon the question, whether the right of recovery is not barred by the Statute of Limitations.

The lessor of the plaintiff was an infant when the adverse possession began, in the year 1772. But admitting that the father, Vincent Matthews, was tenant by the curtesy, there was then a particular estate for life in the premises existing, and no right of entry had descended, or could vest in her, during the continuance of that estate. It was declared, in *Jackson* v. *Schoonmaker*, 4 Johns. Rep. 390, to be the law that the Statute of Limitations did not affect the right of a remainder-man during the continuance of a particular estate; nor would the acts or laches of the tenant of the particular estate affect the party entitled in remainder. The right of entry of the lessor did not accrue, and could not exist during the estate by the curtesy. That estate ceased by the death of Matthews, in 1784, and had she been under no disability she would then have been bound to have brought the suit within 20 years thereafter; but she was at that time a *feme covert*, and protected from the Statute of Limitations by the proviso in favor of the disability of coverture. Laws, vol. i. 563. This is not a case of cumulative or successive disabilities, and we, at present, have no concern with any question to which they might give rise. The coverture was the *first* and only disability existing, when her right of entry accrued, and that is expressly saved by the Statute.

There is no bar to the plaintiff's right of recovery, under the Statute of Limitations, provided her father was a tenant by the curtesy; and this is the next and only real point in the case.

There was no *pedis possessio*, or possession in fact, of the premises, in the popular sense of the words, by either Matthews or his wife, during the coverture; for the lands continued vacant, or remained as new lands, wild and uncultivated, from the date of the patent in 1704, to the time of the commencement of the adverse possession in 1772. The title under the patent to an undivided eighth part of the premises,

clearly existed in Matthews's wife. She derived it by will from her mother, who was one of the four co-heirs of Henry Van Ball. The question is, Was she not to be considered as seised in fact of these premises, so as to enable her husband to become a tenant by the curtesy? To deny this, would be extinguishing the title of tenant by the curtesy, to all wild and uncultivated land. It has long been a settled point, that the owner of such lands is to be deemed in possession, so as to maintain trespass. The possession of such property follows the title, and so continues, until an adverse possession is clearly made out. This is the uniform doctrine of this court; and there is no reason why the same rule should not apply when the title by curtesy is in question. To require the actual occupation of such lands, during the coverture, would be an unreasonable, if not an impracticable requisition. The general language of the English cases is, that there must have been actual entry, but the rule had reference to enclosed or cultivated lands. We must take the rule with such a construction as the peculiar state of new lands in this country requires; and this may be done without any departure from the spirit and substance of the English law. Some of the old books would not allow the curtesy, without actual entry upon the lands, even though it appeared to have been impossible for the husband, with the utmost diligence, to have made the entry during the coverture. Perkins, 470. Doct. & Stud. Dial. 2, *c.* 15. But Lord Coke talks more reasonably. He says, that if a man seised of an advowson, or rent in fee, has issue a daughter, who is married and has issue, and he then dies seised, and the wife, before the rent became due, or the church became void, dies, she had but a seisin in law, and yet her husband shall be a tenant by the curtesy, because he could by no industry attain to any other seisin. *Et impotentia excusat legem.* Co. Lit. 29 a. The letter of the rule was very much relaxed by Lord Hardwicke. In *De Grey* v. *Richardson*, 3 Atk. 469, he allowed the curtesy in lands on which, when they descended to the wife, there were leases for years existing, and a rent accrued which remained due during three months of the coverture, and into which lands she made no entry, nor received any payment during her life. He professed to decide the case, as a question of law, and said that this was such a possession in the wife as made the husband tenant by the curtesy. In another case before Lord Hardwicke, of *Sterling* v. *Peslington*, 7 Viner, 149, pl. 11, he allowed this title, when the wife had been, in fact, denied possession during the coverture, by a tenant in common, who supposed, through mistake, that the wife's right, as heir, had not then accrued.

These cases are as strong as the present, and prove that actual entry, or *pedis possessio*, is not absolutely requisite, and that if the party is constructively seised in fact, it will be sufficient.

The court are accordingly of opinion, that the plaintiff is entitled to recover one undivided eighth part of the premises.

Judgment for the plaintiff.

STODDARD *v.* GIBBS.

CIRCUIT COURT OF THE UNITED STATES. 1832.

[*Reported* 1 *Sumn.* 263.]

TRESPASS and ejectment for certain land in Portsmouth, in the State of Rhode Island. Plea, the general issue. At the trial in June Term last, the jury found a special verdict. The substance of it was, that the plaintiffs were entitled to three fifths of a moiety of the demanded premises, as heirs at-law of their mother, Eliza Gibbs, the wife of the defendant, who died in 1820, seised (as the heir of her mother) of a moiety of the reversion of the demanded premises, which were at the time of her death in the actual possession of her father, Peleg Thurston, who was tenant by the curtesy thereof, and who died afterwards, in December, 1831. The defendant claimed a life estate in the demanded premises, as tenant by the curtesy upon the death of his wife, the mother of the plaintiffs.

The cause was argued by *Hunter* for the plaintiffs, and by *Cranston* and *Hazard* for the defendant.

STORY, J. There is but a single question in this case, and that is, whether in Rhode Island a husband is entitled to a life estate, as tenant by the curtesy, of land of which his wife was in her lifetime seised in fee in reversion.

If this question were to be decided by the common law, it would not admit of controversy. Nothing is better settled in that law than that there can be no curtesy of a remainder or reversion. Mr. Justice Blackstone, in his Commentaries (2 Black. Comm. 127), lays it down as one of the elements of the common law. "There are (says he) four requisites necessary to make a tenancy by the curtesy: marriage, seisin of the wife, issue, and death of the wife. 1. The marriage must be canonical and legal. 2. The seisin of the wife must be an actual seisin or possession of the lands; not a bare right to possess, which is a seisin in law, but an actual possession, which is a seisin in deed. And, therefore, a man shall not be tenant by the curtesy of a remainder or reversion." And this language is fully borne out by Lord Coke, in his Commentary on Littleton. Co. Lit. 29.

Now, the common law was expressly adopted by a Statute of Rhode Island, as early as the year 1700, as the rule in all cases, where no particular colonial law existed on the subject. Rhode Island Colony Laws (1744), p. 28. Of course the common law must prevail, unless there is some statutory provision which has since that period intercepted or varied its application.

Let us see, then, whether any such provision exists. By the Statute of Descents of Rhode Island (1798, 1822), it is enacted, that "when a man and his wife shall be *seised of any real estate* in her right in fee,

and issue shall be born alive of the body of such wife, that may inherit the same, and such wife shall die, the husband shall have and hold such estate during his natural life, as tenant by the curtesy." Rhode Island Laws, Digest, 1822, p. 227, § 8. Now, this description of a tenant by the curtesy is in substance the same, which Littleton (§ 35) has given of a tenant by the curtesy at the common law: "Tenant by the curtesy of England (says he) is where a man taketh a wife *seised in fee simple*, or in fee tail, &c., and hath issue by the same wife, male or female, born alive, albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the law of England." Now, my Lord Coke, commenting on this very passage, says, that the words, "seised in fee," mean a seisin in deed, not a seisin in law; and therefore a man shall not be tenant by the curtesy of a bare right, title, use, or of a reversion or remainder expectant upon an estate of freehold, unless the particular estate be determined or ended during the coverture. Co. Lit. 29. See Cruise's Dig. tit. 5, ch. 1, § 1, pp. 159, 160. So that it is clear, that the words, "seised in fee," do not necessarily, in the language of the law, import a seisin in deed, that is, a present estate in fee in possession. Now, since the rule of the common law was not only well known, but had been adopted in Rhode Island, it would be natural to expect, if the Legislature intended to modify or repeal it, that some language would be used, which should unequivocally, and in terms susceptible of no doubt, express that intention. In such a case we should not expect to find the very language used, which the most accurate writers upon the common law were accustomed to use, to express the very rule of that law. Littleton, § 3. Cruise Dig. tit. 5, ch. 1, § 1, pp. 159, 160. Bac. Abridg. Curtesy, C. 2. Com. Dig. Estate, D. 1. Dane's Abridg. *ch.* 130, art. 3, § 1. *Buckworth* v. *Thirkell*, 3 Bos. & Pull. R. 652, note. Would it be safe for any court to adopt an interpretation abolishing the common law rule, upon so loose a foundation?

The Statute of Massachusetts respecting tenancy by the curtesy, is in precisely the same terms, as that of Rhode Island; and probably the latter was borrowed from the former. See Act of 9th March, 1784. Stat. 1783, *ch.* 36. The uniform interpretation of the Massachusetts Statute has been, that it does not vary the rule of the common law. Dane Abridg., *ch.* 130, art. 3, § 1, 2, 3. This is strong evidence to show, what the fair interpretation of the terms is; or, at least, it shows, that the language reasonably admits of an interpretation consistent with the rule of the common law, and in affirmance of it.

The language of the Rhode Island Statute respecting dower, uses terms nearly the same. It declares, that the widow shall be endowed of one third part of the lands, &c., "whereof her husband, or any other to his use, *was seised of an estate* of inheritance at any time during the coverture." Rhode Island Laws, Digest of 1822, p. 188. Yet, I presume, it was never contended, that this applied to a seisin in law, such as a seisin of a reversion or a remainder.

But it is said, that in the State of Connecticut the doctrine has been settled upon solemn argument, that actual seisin in the wife during the coverture, is not necessary to entitle the husband to a tenancy by the curtesy in her estate. That certainly was the doctrine of the majority of the court in *Bush* v. *Bradley*, 4 Day R. 298, 305, and is probably now deemed the settled law of that State. Reeve's Domestic Relations, pp. 33–35. But it is observable, that the decision in that case was not founded upon any positive language of the Legislature, directly applicable to the case. There was no Statute of Connecticut, which called for any interpretation by the court. The doctrine was avowedly founded upon analogies furnished by the local law of the State. It was said, that the Statute of Limitations of Connecticut in its terms did not take away the title of the original proprietor, but only tolled his right of entry; and yet that it had always been construed to bar all claim of title; while the same words in the English Statute had been considered as having no effect whatever upon the title, but only upon the right of entry. It was also said, that actual seisin was not necessary in cases of descents or devises; but that it was sufficient, that there was a right of property. And if not necessary in such cases, the question was asked, why should it be thought necessary to the husband's title by the curtesy? And the conclusion, to which the court arrived, was, that the English law respecting the efficacy of seisin had long since been departed from in Connecticut, and to adhere to it in the case of the curtesy would mar the symmetry of the law of that State.

Now, however satisfactory this reasoning was to the learned judges, who decided this case, it has not been deemed equally satisfactory to other learned judges in other States, where the local jurisprudence furnished, in whole or in part, similar analogies. They have held, that the common law rule must prevail, until altered by the Legislature; and that they were not at liberty to imply such a repeal upon mere analogy. This doctrine is, *a fortiori*, to be followed in Rhode Island; for, the common law having been adopted by Statute in that State, nothing short of a legislative repeal, either express or necessarily implied, could justify any court of justice, sitting in that State, in an abandonment of it. Now, I confess that I see not the slightest reason for supposing that the Legislature, in the Statute already cited, had the least intention to repeal the common law in regard to tenancy by the curtesy. The language of the Statute is merely affirmative, leaving what is intended by the words, "seised of any real estate," &c., to be ascertained upon the sound rules of interpretation applied to similar cases. It is a general rule of construction, not to presume the common law repealed by a Statute, unless the language naturally and necessarily leads to that conclusion. Besides, though the language is not inconsistent with a larger intent, yet the subsequent words, "the husband shall *have* and *hold* such estate during his life," more naturally apply to a present possessory estate, than to one which may never fall into possession during his life.

The Connecticut law, however, cannot apply to the present case; and indeed is repugnant to the Statute of Rhode Island. By the decision alluded to, it is not necessary that the wife should have any seisin, either in law or fact, of the estate, to give her husband an estate by the curtesy. In the very case decided, she was actually disseised at all times during the coverture; and yet her husband was held entitled as tenant by the curtesy. Now, the Statute of Rhode Island positively requires a *seisin* in the wife during the coverture.

Nor, indeed, in another view, is the Connecticut decision in point. There the wife had a present estate, of which she was, though disseised, entitled to a present possession. No question arose as to curtesy of a reversion or remainder. How that question would have been decided, if it had arisen, this court have no means of ascertaining.

I cannot agree with one remark of the counsel for the plaintiff in the present case, that Eliza Gibbs, the mother of the plaintiffs, was not seised in law of the estate, because she had only a reversion therein, after the tenancy of her father by the curtesy should expire. My opinion is, that there can, technically speaking, be a seisin in law of a reversion, though not in deed; and that such was her predicament. She was, in the strictest sense of the terms, seised of the reversion. See *Cook* v. *Hammond*, 4 Mason R. 488, 489. Plowden R. 191.

Upon the whole, my opinion is that the plaintiffs upon the special verdict are entitled to recover their purparty, as heirs of their mother, Eliza Gibbs.

The district judge concurs in this opinion, and judgment is to be given accordingly.[1]

MELVIN *v.* PROPRIETORS OF LOCKS AND CANALS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1834.

[*Reported* 16 *Pick.* 161.]

WRIT of entry, dated May 10, 1833, for one undivided fourteenth part of a tract of land in Lowell. The demandant counted upon his own seisin within thirty years.

The defendants pleaded the general issue.

At the trial, before *Putnam*, J., it appeared that Thomas Fletcher, who died seised of the demanded premises on August 6, 1771, by his will, devised all his real estate to his two daughters, Rebecca and Joanna, with cross-remainders, reserving the use of one-third part thereof for his widow, so long as she should remain such. Rebecca, the eldest daughter, on January 9, 1773, married Jacob Kittredge, who died in 1813. Joanna, the youngest daughter, on February 29, 1777, married Benjamin Melvin, who immediately entered into the posses-

[1] See *Shores* v. *Carley*, 8 Allen, 425 (1864).

sion of the land. They had seven children, of whom the demandant was one. Benjamin Melvin, the father, died in April, 1830, and his wife died in September, 1826. The demandant entered upon the demanded premises on July 12, 1832, claiming as heir to his mother.

The tenants produced an office copy of a deed from Jacob Kittredge and his wife to Benjamin Melvin, the father, dated April 27, 1782, whereby, for the consideration of £300, they conveyed to him an undivided moiety of a farm in Lowell, formerly owned by Thomas Fletcher, which included the demanded premises. They also produced an office copy of a deed of mortgage of the same date, from Melvin, the father, and his wife, to Jacob Kittredge, conveying to him a certain portion of this farm, including, as the tenants contended, the demanded premises, to secure the payment of £300 in five years.

The tenants proved that in April, 1796, Kittredge took possession of the demanded premises and ejected Melvin, the father, and his wife; and there was no evidence of any occupation of the demanded premises, or of any claim thereto by Melvin, the father, or any of his family, from 1796 until the entry of the demandant in 1832, although they lived in the immediate neighborhood.

The tenants also proved a title in themselves to the land conveyed in mortgage by Melvin, the father, and his wife, to Kittredge, by virtue of several mesne conveyances from the heirs of Kittredge and others.

The tenants then contended, that even if the demanded premises were not embraced in the deed of mortgage, yet that the entry of Kittredge in 1796 and the ouster of Melvin, the father, and his wife, operated as a disseisin of them, and that by the uninterrupted possession of the tenants and those under whom they claim, for more than thirty years before the entry of the demandant, his right of entry was barred by St. 1786, *c.* 13, § 4, which limits the right of any person under no disability, to make an entry into lands, &c., to twenty years next after his right or title first descended or accrued, with a saving to *femes covert*, &c. of a right to make such entry at any time within ten years after the expiration of said twenty years aforesaid, and not afterwards.

But the judge instructed the jury that the wife of Melvin, the father, was not disseised during her coverture, and that the demandant's right of entry would not be barred by an undisturbed possession of the demanded premises by the tenants for more than thirty years, because such possession would not be adverse to the wife during the coverture; and that the only question for them to consider was, whether the demanded premises were intended by the parties to be conveyed by the deed of mortgage.

The jury found a verdict for the demandant.

If the instructions to the jury were incorrect, a new trial was to be granted.

J. Mason, *Hoar*, and *Robinson*, for the tenants.

Fletcher, *Mann*, and *Smith*, for the demandant.

The opinion of the court was afterwards delivered by

WILDE, J. In order to determine the general question, whether, upon the facts in the case, the demandant had any right of entry in 1832, I shall first consider whether Melvin and wife were disseised by the entry of Kittredge, and their expulsion in 1796. That they were seised in fee in right of the wife, before and at the time of the entry by Kittredge, cannot, we think, be controverted. In all real actions, brought by husband and wife to recover the wife's land, their estate is always so stated; and is so stated because such is the legal nature of their estate. By marriage the husband and wife are regarded in law as one person, the legal existence of the wife being incorporated and consolidated into that of the husband; and he has the absolute authority to act for her, but not to bind her in all cases. He may dispose of her chattels, real and personal, but cannot alienate her real estate without her consent. The husband acquires by the marriage a freehold estate, but not the fee, which still remains in the wife. But both together have the whole estate, and therefore in law they are both considered as seised in fee, and must so state their title in pleading. The husband cannot aver, in pleading, that he alone is seised in fee in right of his wife, because the fee is in the wife, and of this he is seised jointly with her.

This is the established form of pleading such a title, and it has been truly and very frequently remarked, that the forms of pleading generally may be relied on as the most accurate test of legal principles. It is laid down by Comyns (Dig. Baron & Feme, 2 D), "that if baron and feme are seised, they ought to plead, that they are both seised *in jure uxoris*, and not that the husband is seised;" and so say all the authorities. In the case of *Catlin* v. *Milner*, 2 Lutw. 1422, which was trespass *quare clausum* against husband and wife, the plea was that the husband was seised in his demesne as of fee, in right of his wife, that he thereupon demised the premises to the plaintiff, and that he entered to make distress for rent in arrear; on demurrer, this plea was held to be bad, because they were *both* seised in right of the wife. The same decision was made in the case of *Polyblank* v. *Hawkins*, 1 Dougl. 329. In that case, which was an action of covenant against the assignee of a lease, by the husband of the heir-at-law of the original lessor, the plaintiff in the declaration averred, that the reversion descended and came to his wife, whereupon the plaintiff became seised of said reversion in his demesne as of freehold, in right of his wife. The defendant demurred, because in the declaration the plaintiff's title was not correctly stated; for that instead of the averment, that the plaintiff was seised of the reversion in his demesne as of freehold, he ought to have averred that he and *his wife* were seised in their demesne as of fee. The plaintiff's counsel in that case admitted that the usual form of declaring was in the manner contended for by the defendant's counsel, and that the case of *Catlin* v. *Milner* was rightly decided; but they attempted to make a distinction between cases where it was necessary to set out the whole of the estate, and those in which a part only would

be sufficient to maintain the action; but the court held, that the declaration was bad in point of form, because the *exact* title was not set out.

These cases seem decisive, not only as to the form of pleading, of which there can be no question, but they decide that the form of pleading is in conformity with the exact title which the husband and wife have in the wife's lands, while they remain seised. It seems unnecessary to refer to any further authorities on this point; for I apprehend that it is quite clear, that the husband cannot be seised in fee of his wife's lands, unless she also is seised; that he acquires no seisin in fee by the marriage; for he, at most, acquires only a freehold estate, and unless the wife continues seised, the fee would be in abeyance. The husband has a life estate, and the wife has an estate in fee, and by consolidating the two estates, both, in legal contemplation, are considered as seised of the whole estate.

The next question to be considered is, whether Melvin the elder and his wife were disseised by the entry of Kittredge in 1796. And we think it very clear, that they were. They were actually ousted and divested of their seisin and possession, and the seisin and possession of Kittredge was substituted therefor; and this unquestionably amounted to a disseisin of both, as both at the time of the entry were seised. Co. Lit. 153; *Clapp* v. *Bromaghan*, 9 Cowen, 552.

We think it equally clear that a right of entry immediately thereupon accrued to both the husband and wife. It has been argued, that the husband alone had the right of entry, that he had a life estate in the premises, and that no right of entry accrued to the wife until his death. It is true that if Kittredge had held under the husband, the wife would have had no right to enter, nor could she enter against the will of the husband; but with his consent, express or implied, or in his absence, she had an unquestionable right to enter. Her right of entry as against Kittredge was perfect, although in the exercise of her right she was subjected to the control of her husband. There is no doubt, that he had a right to create a particular estate, and so he might discontinue his wife's estate by feoffment, and by the common law she would have no right to enter on the feoffee, even after her husband's death, but was driven to her action *cui in vita;* but in the present case Melvin and his wife were jointly seised and disseised; and either of them or both might enter on the disseisor. That she was *sub potestate viri* does not prevent the right of entry from accruing to her; otherwise no right of entry could descend or accrue to a *feme covert*, and the saving clauses in the several Statutes of Limitation, in favor of *femes covert*, would be useless and senseless. A *feme covert* is capable of purchasing, but the husband may disagree, which will avoid the purchase; but if he neither agrees nor disagrees, the purchase is good. Co. Lit. 3 a. And in like manner, a right of entry may descend or accrue to her, and her entry will be lawful, provided the husband does not expressly disagree, for his consent is presumed, it being for his advantage. We are therefore of opinion, that the right to enter on the demanded premises accrued

to the demandant's mother immediately after the entry and ouster by Kittredge.

We then come to the general question, whether the demandant had a right of entry at the time he entered, or whether it was not tolled by the tortious entry of Kittredge and lapse of time. This question depends on the St. 1786, *c.* 13, taken in connection with the principles already considered. By § 4, it is enacted that no person, unless by judgment of law, shall make any entry into any lands, tenements, or hereditaments, but within twenty years next after his right or title first descended or accrued to the same, provided that when any person that is or shall be entitled to make any entry, shall, at the time the said right or title first descended, accrued, or fell, be within the age of twenty-one years, *feme covert*, *non compos*, imprisoned, or beyond seas, or without the limits of the United States, that then such person shall and may make such entry at any time within ten years after the expiration of the said twenty years aforesaid, and not afterwards. We think the language of this Statute extremely clear, and that the intention of the Legislature cannot be doubted. It is equivalent to an express provision, that no person under any of the disabilities named in the Statute should be allowed to make any entry upon lands, unless the entry should be made within thirty years next after his title descended or accrued to him. This to my mind seems as clear as that twenty and ten make thirty. The rules of construction, therefore, which may be very important and useful, when the true meaning of a Statute may be doubtful, can have no application to the provision in question, the language of which is so plain and unambiguous. It has been argued that other Statutes *in pari materia* would explain and control the literal meaning of this; but we think the construction contended for by the demandant's counsel derives no aid by any reference to former Statutes; for the language of this Statute and the previous Statutes on the same subject, are essentially different; and to suppose that the Legislature would essentially vary the language of a former Statute, so as to convey a different meaning, without intending to make any alteration in the law, would be an imputation on the understanding of the Legislature, which cannot be admitted.

It has been said that the Statute, according to its literal meaning, is unreasonable, and that it should have a reasonable construction. But we do not perceive that the Statute is unreasonable according to its literal import; especially as it bars the right of entry only, leaving the party other remedies to recover his estate. In the present case, the demandant would not be barred, if he had declared in another form, and not on his own seisin; and his remedy would have been equally simple and effectual as in the present form of action. But if the limitation in the Statute were as unreasonable as the plaintiff's counsel suppose it to be, we must be governed by it, the meaning being clear, and are not at liberty to speculate on its supposed impolicy.

Upon the whole, therefore, we are of opinion, that the demandant

never had any right of entry into the demanded premises, that his actual entry on the tenants was tortious, and consequently that he acquired no seisin thereby. The right of entry accrued to the demandant's mother in April, 1796, and she died in September, 1826 (more than thirty years), without making any entry into the premises, or any claim thereto, the tenants and those under whom they claim remaining in the undisturbed possession of the same for the whole time. Her right of entry, therefore, was barred and did not descend to the demandant. Whether it would have so descended, if the mother had died within the thirty years, is a question which it is unnecessary to decide.

It is clear, however, that if the demandant would have had a right to enter, as heir in such a case, he must have entered within thirty years from the time the right first accrued to his mother.

New trial granted.

WATSON *v.* WATSON.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1839.

[*Reported* 13 *Conn.* 83.]

THIS was an action of ejectment; tried at Hartford, September Term, 1838, before *Bissell*, J.

In the lifetime of Ann Watson, and until her death, the demanded premises were owned by her in fee; and the plaintiffs are her children and heirs-at-law, by John Watson, to whom she was lawfully married, and who is still living. The plaintiffs claimed, that John Watson had not an estate by the curtesy in the premises; and to establish this point, they offered in evidence the following writing, under his hand and seal, dated the 23d of February, 1837, after the death of his wife: "Know all men, by these presents, that I, John Watson, do hereby publish, declare, and make known, to all whom it may concern, and especially the heirs and children of my late wife, Ann Watson, that I have not, at any time hitherto, and now do not claim, demand, possess, or in any manner or to any extent whatever, have or pretend to have, any right, title or interest, in three pieces of land [describing the premises], but do now fully, absolutely, and without any reservation, disclaim and reject any and all right, title and interest in the same, which I might or could have had, by operation of law or otherwise, by reason of my surviving my said wife, or any title to said premises which she had during her life." This writing was signed and sealed by John Watson, attested by two witnesses, acknowledged before a Justice of the Peace, and recorded in the town records. It was admitted by the plaintiffs, that John Watson was tenant by the curtesy of the demanded premises, and that

they could not recover in this action, unless by operation of this writing, he had no such estate. The defendant objected to the admission of it in evidence to the jury; and the court rejected it; and a verdict passed for the defendant. The plaintiffs thereupon moved for a new trial.

W. W. Ellsworth and *Toucey*, in support of the motion.

Hungerford and *T. C. Perkins*, contra.

WAITE, J. The object of a disclaimer, is, to prevent an estate *passing* from the grantor to the grantee. It is a formal mode of expressing the grantee's dissent to the conveyance before the title has become vested in him. In some cases, it may be highly proper; as where a deed is made conveying an estate to one for life, with a remainder to another in fee. Here, in the absence of all evidence to the contrary, the law would presume the assent of the grantee in remainder, upon delivery of the deed to the grantee for life, for the benefit of both. But if the remainder-man chooses not to take the estate, he may disclaim, and thereby remove all presumption of assent. So, where a deed is executed to several persons, and delivered to one for the benefit of all, if one dissents, he may disclaim, and furnish evidence that his share still remains in the grantor. *Treadwell et al.* v. *Bulkley et al.*, 4 Day, 395.

But if the grantee once assents, and the title thereby becomes vested in him, he cannot, by any disclaimer, revest the estate in the grantor. For if he could, the disclaimer would have the effect of a deed, which it cannot have; the object of the latter being to *transfer* property, — of the former to *prevent* a transfer.

But in a case of dissent, the heir cannot, by any disclaimer, prevent the estate from passing to him. It vests in him *immediately* upon the death of the ancestor; and no act of his is required to perfect his title. He cannot, by any act, cause the estate to remain in the ancestor; for the latter is incapable of holding it, after his death. Nor can he, by a disclaimer, transfer the estate to any other person, as the heir of the ancestor; for, as has already been observed, the object of a disclaimer is not to *convey*, but to *prevent* a conveyance. He is, therefore, in the same situation, upon the death of the ancestor, as a purchaser, who has assented to the conveyance. In both cases, a transfer can only be made, by some instrument adapted to the conveyance of real estate.

A devisee, however, stands in the same situation as a purchaser. If he dissents, the estate passes to the heir, in the same manner as if no will had been made. It is entirely optional with him to take or refuse the estate devised. *Townson* v. *Tickell et al.*, 3 Barn. & Ald. 31.

In the present case, the disclaimer was made by one who was entitled to the property as tenant by the curtesy. Is he, in this respect, like a grantee, or an heir? This species of estate has sometimes been classed with those acquired by purchase. But it is rather an estate thrown upon the tenant by operation of law. Co. Lit. 18 b. It par-

takes more of the character of an estate acquired by descent than by purchase. Immediately upon the death of the wife, the estate vests in him. Like the heir, he cannot, by refusing to take it, cause it to remain in the wife; nor can he, by a disclaimer, transfer it to others. The estate thus vested in him, becomes immediately liable for his debts; and he cannot, by any refusal to take the property, defeat the claims of his creditors.

The disclaimer offered in evidence could have no effect in showing a title in the plaintiffs; and was properly rejected by the court.

We are, therefore, satisfied, that no new trial should be granted.

In this opinion the other judges concurred.

New trial not to be granted.

ADAIR *v.* LOTT.

SUPREME COURT OF NEW YORK. 1842.

[*Reported* 3 *Hill*, 182.]

EJECTMENT, for an undivided eighth part of one hundred and twenty acres of land in Lodi, Seneca County, tried at the Seneca Circuit in November, 1841, before *Mosely*, C. Judge. From the deeds given in evidence by the plaintiffs it appeared, that Abraham Irvine in September, 1814, conveyed the premises in question to the following persons, to be held by them in the proportions annexed to their respective names, to wit, Drake Runyon and Lewis Runyon each one fourth part, Jane Irvine, Delia Adair and Margery Ellis, each one eighth part. The other eighth was reserved by the grantor. In 1827 Drake Runyon conveyed to Lewis Runyon. In 1835 Lewis Runyon conveyed to John DeMott, who conveyed to the defendant, and he is in possession of the premises. The plaintiffs are the children and heirs-at-law of Delia Adair, and claim the undivided eighth which she took under the deed from Abraham Irvine in 1814. Mrs. Adair died in 1815, leaving her husband, George Adair, the father of the plaintiffs, who left this State soon afterwards, and now resides in one of the Western States. The difficulty which stood in the way of the plaintiffs was the estate for life of their father as tenant by the curtesy. To obviate this difficulty the plaintiffs proved by parol evidence that their grandfather, Philip Runyon, formerly owned land in New Jersey, and after his death, dower was set off to his widow. She sold her right in that land, and the premises in question in this suit were bought of Abraham Irvine with the dower money of the widow. The deed was given to her children, and she was to have a life estate in the farm. The witness knew nothing about this purchase except what the parties had told her. The widow went into possession of the farm and continued in possession,

claiming a life estate, until after the death of Mrs. Adair, the plaintiff's mother, in 1815; and in the following spring the widow sold out her right to Drake Runyon, who then took possession of the property. Since that time the possession has gone along with the paper title above set forth. Drake Runyon bought out all the other heirs except Delia Adair. The widow of Philip Runyon died in 1831. Neither Mrs. Adair nor her husband was ever in possession. The defendant objected against this parol evidence to prove the sale and purchase of lands, but the judge admitted it for the purpose of showing in what capacity the widow of Philip Runyon held possession, and to rebut the idea that George Adair was a tenant by the curtesy. The defendant moved for a nonsuit, which was refused. The defendant then requested the judge to charge the jury that the plaintiffs could not recover while there was a subsisting tenancy by the curtesy. The judge said, that if such was the fact, the plaintiffs could not recover until after the death of the husband of Delia Adair; but upon the facts in the case as to the possession of the premises by the grandmother (the widow of Philip Runyon), and their mother (Mrs. Adair) not having been in actual possession during her life, he advised the jury to find for the plaintiffs for one eighth of the premises. Verdict accordingly. The defendant now moved for a new trial on a case.

A. Gibbs, for the defendant.

N. Hill, jun., for the plaintiffs.

By the Court, Bronson, J. The first argument for the plaintiffs is, that under the purchase from Irvine in 1814, their grandmother, the widow of Philip Runyon, took an equitable estate for life in the land, and the grantees named in the deed took only a remainder in fee. And then as the life estate of the grandmother did not terminate until after the death of Delia Adair, the mother of the plaintiffs, there was no such actual seisin in Delia Adair as would entitle her husband to take as tenant by the curtesy — there being no curtesy in the wife's remainder expectant upon an estate of freehold, though it is otherwise of a remainder expectant upon an estate for years. Co. Lit. 29 a; *Stoddard* v. *Gibbs*, 1 Sumner, 263; 2 Black. Com. 127; 4 Kent, 29, 30; *De Grey* v. *Richardson*, 3 Atk. 469; *Stoughton* v. *Leigh*, 1 Taunt. 402. I do not think it necessary to inquire whether this rule of the common law prevails in this State; for the plaintiffs only allege that their grandmother had an *equitable* estate for life, and we are in a court of law, where the legal title must prevail. If we look at the legal title, it appears that Mrs. Adair took a present estate in fee in an undivided eighth part of the farm, and her husband, the father of the plaintiffs, is clearly entitled to a life estate in her share as tenant by the curtesy unless it be an objection to his claim that there was no actual seisin or possession in the wife, — a question which will be noticed hereafter.

It is said that we may presume a conveyance of a life estate to the grandmother. But there is no foundation for such a presumption. We see that Irvine conveyed the whole fee to others. And there is no rea-

son for supposing that the grantees in that deed conveyed a life estate to their mother. The parol evidence, if it was admissible for any purpose, shows that there was a family arrangement, under which the land was purchased and conveyed to Drake Runyon and others to hold in certain proportions, with an understanding that the mother of the grantees should occupy the property as long as she lived. She entered and held a year or two, and then sold out her possession — or equity, if it amounted to so much — to Drake Runyon. There is not the slightest foundation for presuming that the grantees of Irvine ever conveyed any title to their mother.

If we look at the parol evidence, it proves too much for the plaintiffs' case. Their grandmother paid the whole of the purchase-money to Irvine, and if this payment is not to be regarded as a gift of so much money to her children, the grantees in the deed, and if a resulting trust can be set up at law, the grandmother took a fee in the land. She soon afterwards sold her right to Drake Runyon, and from him there is a complete chain of title down to the defendant. But the parol evidence was only admissible for the purpose of characterizing the possession of the grandmother, and not by way of making out a legal title.

It is said that George Adair did not take as tenant by the curtesy, because there was no actual seisin in the wife during the coverture. But the doctrine that there must be a seisin in deed in the wife, only applies in cases where her title is not complete before entry, as where she takes as heir or devisee, and not where she takes by a conveyance which passes the legal title and seisin of the land. (*Jackson* v. *Johnson*, 5 Cowen, 74, 97; and see *Ellsworth* v. *Cook*, 8 Paige, 643.) Here the estate was conveyed to Delia Adair and others by a deed which had its operation under the Statute of Uses. It passed the legal title and seisin of the land, without the necessity of an entry, or any other act to perfect the estate of the grantees. They gave their mother a parol license to enter and hold for her life. But as there was no writing, she was at most only a tenant at will. Her possession was their possession, and so there was an actual, as well as legal seisin in the grantees.

It is then said that the interest of a tenant by the curtesy is only an encumbrance or charge on the land, which cannot be set up by a stranger to defeat the legal title; and for this doctrine we are referred to *Doe* v. *Pegge*, 1 T. R. 758 *n.*, and *Jackson* v. *Hudson*, 3 John. 375. But these cases do not bear the counsel out. The interest of a tenant by the curtesy is something more than a mere charge or encumbrance; it is a legal estate in the land.

The only remaining argument for the plaintiffs is, that an extinguishment of the estate of their father as tenant by the curtesy should be presumed. His life estate could only be extinguished by a conveyance, and I see no ground upon which a grant by him to the plaintiffs can be presumed. Neither the plaintiffs nor any one claiming under them

have ever been in possession. The defendant is in possession claiming the whole as owner. Presumptions are sometimes indulged for the purpose of supporting a possession; but not very often for the purpose of overturning it. In truth, there is no reason to suppose that the father of the plaintiffs ever parted with his life estate to any one.

The plaintiffs can only recover upon the strength of their own title, and they have no right to the possession so long as their father lives.

New trial granted.

FOSTER *v.* MARSHALL.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1851.

[*Reported* 22 *N. H.* 491.]

WRIT OF ENTRY. The facts in this case are sufficiently stated in the opinion of the court, delivered by

BELL, J. The principal question arising in this case, is as to the effect of the Statute of Limitations upon the demandant's right of action. It appeared that the demanded premises were set off by a committee of partition, appointed by the Court of Probate, to Mary Foster, formerly Mary Eastman, the mother of the demandant, as her share of the estate of her father, Samuel Eastman, deceased, on the 14th of May, 1814. Mary Foster was then the wife of Frederick Foster, by whom she then had one or more children. Frederick Foster died in 1834, and his wife in 1836. They had six children, whose rights are said to be now vested in the plaintiff.

The defendant proved, that in 1817, one Morrill was in possession, claiming to be the owner of the demanded premises. He conveyed the same by deed, dated July 3, 1817, to one Marshall, who entered and occupied, claiming title, till April 30th, 1847, when he conveyed to the tenant, who has since remained in possession. The tenant claims that he has a perfect title by thirty years' undisturbed and peaceable possession. The demandant alleges that his right is not barred, because at the time when the disseisin occurred, in 1817, Mrs. Foster was a *feme covert*, and up to 1834 her husband had an estate for life in the premises and she had no right of entry until his decease, and consequently no right of action till then, and that since that time twenty years have not elapsed.

Under the Statute of Limitations, which was in force in this State before the Revised Statutes, it must be considered settled, that the Statute did not affect the right of a remainder-man or reversioner, during the continuance of the particular estate; and that neither the acts nor the laches of the tenant of the particular estate could affect the party entitled in remainder. *Wells* v. *Prince*, 9 Mass. Rep. 508;

Wallingford v. *Hearl*, 15 Mass. Rep. 471; *Tilson* v. *Thompson*, 10 Pick. Rep. 359.

No right of entry or action accrued to, or vested in, the heirs of the wife during the continuance of an estate by the curtesy. *Jackson* v. *Schoonmaker*, 4 Johns. Rep. 390.

But the party entitled is not barred, until the usual period of limitation after the termination of the life estate. *Heath* v. *White*, 5 Conn. Rep. 228; *Witham* v. *Perkins*, 2 Greenl. Rep. 400.

If, then, the husband had, in this case, an estate by the curtesy, or any interest in the land which would entitle his wife, who survived, to be regarded as seised only in remainder or reversion, she and her heirs would have the full period of twenty years after the death of the husband, to commence their action.

To constitute a tenancy by the curtesy, the death of the wife is one of the four things required. The estate of the husband is *initiate* upon the birth of issue. It is consummate on the death of the wife. 4 Kent's Comm. 29; Co. Lit. 30 a.

By the intermarriage, the husband acquires, a freehold interest, during the joint lives of himself and his wife, in all such freehold property of inheritance, as she was seised of at the time of marriage, and a like interest vests in him in such as she may become seised of during the coverture. The husband acquires, *jointly with the wife*, a seisin in fee in the wife's freehold estates of inheritance, *the husband and wife* being seised in fee *in right of the wife*. Gilb. Ten. 108; Co. Lit. 67 a; *Palyblank* v. *Hawkins*, 1 Saund. Rep. 253 *n.*; s. c. Doug. 350.

This interest may be defeated by the act of the wife alone; as if, at common law, the wife is attainted of felony, the lord by escheat could enter and eject the husband. 4 Hawk. P. C. 78; Co. Lit. 40 a; Vin. Ab. Curtesy, A.; Co. Lit. 351 a.

After the birth of issue the husband is entitled to an estate for his own life, and *in his own right*, as tenant by the *curtesy initiate*. Co. Lit. 351 a, 30 a, 124 b; *Schermerhorn* v. *Miller*, 2 Cowen's Rep. 439. He then becomes *sole tenant* to the lord, and is *alone* entitled to do homage for the land, and to receive homage from the tenants of it, which until issue born must be done by husband *and wife*. 2 Black. Com. 126; Lit. § 90; Co. Lit. 67 a, 30 a.

Then he may forfeit *his* estate for life by a felony, which until issue born, he could not do, because his wife was the tenant. 2 Black. Com. 126; Roper, Hus. & Wife, 47.

If the husband, after the birth of issue, make a feoffment in fee, and then the wife dies, the feoffee shall hold the land during the husband's life; because by the birth of issue, he was entitled to curtesy, which beneficial interest passed by the feoffment. Co. Lit. 30 a.

If such feoffment is made before issue born, the husband's right to curtesy is gone, even though the feoffment be conditional and be afterwards avoided. And if in such case the husband and wife be divorced

a vinculo matrimonii, the wife may enter immediately. *Guneley's Case*, 8 Co. Rep. 73.

The husband's estate after issue born will not be defeated by the attainder of the wife, for his tenancy continues, he being sole tenant. 1 Hale, P. C. 359; Co. Lit. 351 a, 40 a; Bro. Ab. Forf. 78.

The obvious conclusion from these views of the nature of the interest of a tenant by the curtesy initiate is, that such tenant is seised of a freehold estate in his own right, and the interest of his wife is a mere reversionary interest, depending upon the life estate of the husband. The necessary result of this is, that the wife cannot be prejudiced by any neglect of the husband, and of course she may bring her action, or one may be brought by her heirs, at any time within twenty years after the decease of the husband, when his estate by the curtesy, whether initiate or consummate, ceases, and her right of action, or that of her heirs, accrues. In this respect there is no distinction between curtesy initiate and curtesy consummate. *Melvin* v. *Locks & Canals*, 16 Pick. R. 140.

So far as we are aware, this principle has never been questioned, where the inheritance of the wife has been conveyed to a third person, either by the deed of the husband alone, or by a deed executed by husband and wife, which from some defect did not bind the interest of the wife. *Miller* v. *Shackelford*, 3 Dana Rep. 289; *Caller* v. *Metzer*, 13 Serg. & Rawle Rep. 356; *Fagan* v. *Walker*, 5 Iredell Rep. 634; *McCorry* v. *King*, 3 Humph. Rep. 267; *Mellus* v. *Snowman*, 8 Shepley Rep. 201; *Meramon* v. *Caldwell*, 8 B. Mon. Rep. 32; *Gill* v. *Fauntleroy*, Ib. 177; *Melvin* v. *Locks & Canals*, 16 Pick. Rep. 140. But it has been held (*Melvin* v. *Locks & Canals*, 16 Pick. Rep. 161; *Kittredge* v. *Locks & Canals*, 17 Pick. Rep. 246), that where a disseisin has been committed upon the wife's estate, the disseisin is done alike to the husband and wife; that a joint right of entry and of action accrues to both for the recovery of it; and that if such remedy is not prosecuted within twenty years, it is barred.

This is true where the husband has acquired no estate by the curtesy, and is seised merely in the right of the wife of her estate. Such are the cases of *Guion* v. *Anderson*, 8 Humph. Rep. 298; *Mellus* v. *Snowman*, 8 Shep. Rep. 201.

And if the husband is tenant by curtesy, as he and his wife are seised of the fee in right of the wife, the action must be brought by husband and wife, and a joint seisin in fee alleged in them in her right. Anon., Buls. 21. Their joint right of action is barred by the lapse of twenty years after it accrues. But it by no means follows that the reversionary right of the wife, accruing in possession after the estate of her husband has ceased, is also barred. It is well settled that the same party may have several and successive estates in the same property, and several rights of entry by virtue of those estates, and one of those rights may be barred without the others being affected. *Hunt* v. *Burn*, 2 Salk. 422; *Wells* v. *Prince*, 9 Mass Rep. 508;

Stevens v. *Winship*, 1 Pick. Rep. 318; *Tilson* v. *Thompson*, 10 Pick. Rep. 359.

And every reason, which can exist in favor of the right of any reversioner, applies equally in this case, namely, that a reversioner has, as such, no right of entry and no right of action during the particular estate, and consequently is not barred until twenty years after his own right of entry accrued. 2 Sugd. V. & P. 353; 3 Steph. N. P. 2920, *n.* 10; 9 Mass. Rep. 508; 1 Pick. Rep. 318; 15 Mass. Rep. 471; 10 Pick. Rep. 359; 4 Johns. Rep. 390, before cited. Besides, the wife by reason of her disability can make no entry to revest her estate during the coverture. Lit. p. 403; Co. Lit. 246 a. Coke says in express terms, "after coverture, she (the wife) *cannot enter* without her husband."

In *Jackson* v. *Johnson*, 5 Cow. Rep. 74, and *Heath* v. *White*, 5 Conn. Rep. 228, this question arose, and was decided in accordance with our views, and we think upon sounder principles than the cases in Massachusetts, to which we have referred.

We have compared the provisions of the Revised Statutes with the older Statutes, and do not perceive that there is, as to the point in question, any difference in their effect. Under neither would the plaintiff propose to claim any advantage from the proviso. His ground is not that the ancestor was a married woman, when her right accrued, but that her marriage and the birth of one or more children had vested a life estate in her husband, and that the disseisin was done to him, and that no right of action accrued to her in virtue of the reversionary interest, under which her heirs now claim, until she became a widow, and the husband's estate had terminated; and that the action is brought within twenty years after that event. This appears to us a correct view of the case, and of the law; and the verdict must therefore be set aside, and a

New trial granted.

Hackett, for the demandant.
Porter, for the tenant.

BORLAND *v.* MARSHALL.

HUNTER *v.* DURRELL.

SUPREME COURT OF OHIO. 1853.

[*Reported* 2 *Ohio St.* 308.]

BOTH these cases depend on the same question. They are writs of error to the Court of Common Pleas of Hamilton County, and are part of the series to which belong the cases of *Buchanan* v. *Roy's Lessee*, and *Fowler's Lessee* v. *Whiteman*, 2 Ohio St. 251, 270.

In the case of *Borland's Lessee* v. *Marshall*, it was proved by the plaintiffs that Isabella Hill, a sister of Timothy Trimble, deceased,

acquired title to one-seventh of one-half of the land in controversy, by the decease of her brother in 1810. That Isabella died leaving issue, of whom Isabella, wife of Charles Borland, was one, and that on the death of her mother, in 1837, Isabella Borland acquired title, by descent, to one-fourth of one-seventh of one-half of the land. That Isabella, the younger, was married to Charles Borland in 1819, and that she died intestate in 1845, leaving two children as her heirs-at-law, who are the lessors of the plaintiff in this case. These facts they prove by Charles Borland, the husband of Isabella, and the father of the children.

It was also proved, or admitted by the plaintiffs, that at the date of the adverse possession of Mr. Longworth, the lands were wild and unsettled.

In the case of *Hunter's Lessee* v. *Durrell*, it was proved by the plaintiffs, that Elizabeth Trimble, a sister of Timothy Trimble, was married, in 1790, to Samuel Hunter, by whom she had lawful issue. That Elizabeth Hunter died about the year 1838, leaving issue, who are the lessors of the plaintiffs, and that her husband and the father of the plaintiffs was living when this suit was brought. The lands were wild, and all the lessors of the plaintiffs were non-residents of the State of Ohio.

The plaintiffs then rested their cause, and a motion was made by the defendant in each suit for nonsuit on the ground that, by the plaintiffs' own showing, a freehold estate was outstanding in Messrs. Borland and Hunter, respectively, as tenants by the curtesy, and that no recovery could be had on the demises of the present plaintiffs during the existence of the estates by the curtesy. These motions the court allowed, and directed judgments of nonsuit, which were accordingly entered.

The plaintiffs in each case took a bill of exceptions to the action of the court in granting the judgment of nonsuit, and to review that action of the court upon these motions these writs of error are prosecuted.

Gholson and *Miner*, and *O. M. Spencer*, for plaintiffs in error.

Chase and *Ball*, and *Pugh* and *Pendleton*, for defendant.

THURMAN, J. The decision of this cause depends upon the answer that shall be given to the following question: Is a man entitled to curtesy in lands, the title to which descended to his wife during coverture, but which were in the actual possession of an adverse claimant from the time her title accrued until her death? It is very clear that, by the strict rule of the common law, he is not; and for the reason that neither the wife, nor the husband in her right, was at any time during coverture actually seised of the premises. Four things, according to the common law, are necessary to create an estate by the curtesy, viz: marriage, seisin of the wife, issue, and death of the wife. Co. Lit. 30 a. And where the wife's title is derived by inheritance, or any other mode requiring an entry to perfect it, the seisin must be in deed, and not merely in law. Co. Lit. 29 a; *Jackson* v. *Johnson*, 5 Cow. 98.

But it is contended, that in Ohio seisin is unnecessary; and this leads

us to inquire: 1. What is the reason of the common-law rule requiring seisin? 2. Does the reason exist in this State? 3. If it does not, is the maxim applicable, *Cessante ratione, cessat ipsa lex*, the reason ceasing, the law itself ceases?

The books generally, and with but few exceptions, give but one reason for the rule making seisin indispensable to curtesy, namely, that as, by the common law, livery of seisin was necessary to the transfer of a freehold estate by deed, and an entry necessary to perfect the title to such an estate, of an heir or devisee, it followed that unless the wife, or the husband in her right, was actually seised, her issue could never, *as her heirs*, inherit the lands; for owing to the want of actual seisin, she never acquired an inheritable estate. But unless she had an estate of inheritance there could be no curtesy, as it was indispensable to the existence of curtesy that the mother be seised of an estate which might descend to her heirs, and "the tenancy by curtesy is an excrescence out of the inheritance." 3 Bac. Abr. 11 (Bouvier's edition).

Thus, Littleton says (sect. 52): "And memorandum that, in every case where a man taketh a wife seised of such an estate of tenements, &c., as the issue which he hath by his wife, may by possibility inherit the same tenements of such an estate as the wife hath, *as heir to the wife;* in this case, after the decease of the wife, he shall have the same tenements by the curtesy of England, but otherwise not."

Commenting on the above expression, "as heir to the wife," Coke says: "This doth imply a secret of law, for except the wife be actually seised, the heir shall not (as hath been said) make himself heir to the wife; *and this is the reason that a man shall not be tenant by the curtesy of a seisin in law.*" Co. Lit. 40 a.

And, in illustration of the law that the wife must have an estate inheritable by her issue, the following case is put: "If lands be given to a woman and to the heirs *males* of her body, she taketh a husband and hath issue a daughter and dieth, he shall not be tenant by the curtesy; *because the daughter by no possibility could inherit the mother's estate in the land;* and therefore where Littleton saith, issue by his wife male or female, it is to be understood, which by possibility may inherit *as heir to her mother* of such estate." Co. Lit. 29 b.

Blackstone puts the same case, and adds: "And this seems to be the principal reason why the husband cannot be tenant by the curtesy of any lands of which the wife was not actually seised, because, in order to entitle himself to such an estate, he must have begotten issue that may be heir to the wife; but no one, by the standing rule of law, can be heir to the ancestor of any land, whereof the ancestor was not actually seised." 2 Bla. Com. 128.

In a subsequent passage, he suggests an additional reason. It is as follows: "A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowable: for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands; which is one

reason why he shall not be tenant by the curtesy, but of such lands whereof the wife, or he himself in her right, was actually seised in deed." 2 Bla. Com. 132. The only authority referred to by Blackstone, in support of the above, is Co. Lit. 31, where the diversity between dower and curtesy is noticed, but no such reason as Blackstone gives for denying curtesy is stated, although it may be inferred.

What Coke says is as follows: "For a woman shall be endowed of a seisin in law. As where lands or tenements descend to the husband, before entry he hath but a seisin in law, and yet the wife shall be endowed, albeit it be not reduced to an actual possession, for it lieth not in the power of the wife to bring it to an actual seisin, as the husband may do of his wife's land when he is to be tenant by the curtesy, which is worthy the observation."

As before observed, it is only by inference that this passage supports Blackstone's remark. It is to some extent fortified, however, by the following language in 7 Viner's Abr. 149, namely: "*Feme* shall be endowed of a seisin and possession in law, without seisin in deed, *quod nota;* for otherwise it is of tenant by the curtesy, and the reason *seems* to be, inasmuch as the baron may enter *in jure uxoris*, but the *feme* cannot compel her baron to enter into his own land."

On the other hand, the following extract from 3 Bac. Abr. 12, is certainly opposed to the existence of this reason, as the idea is rejected that the allowing or disallowing curtesy is dependent on the ability or inability, industry or negligence, of the husband. "But now of such inheritances, whereof there cannot possibly be a seisin in fact, a seisin in law is sufficient; and therefore if a man seised of an advowson or rent in fee, hath issue a daughter, who is married and hath issue, and he dieth seised, and the wife dieth likewise before the rent becomes due, or the church becomes void, this seisin in law in the wife shall be sufficient to entitle her husband to be tenant by the curtesy, because, say the books, he could not possibly attain any other seisin, as indeed he could not; and then it would be unreasonable he should suffer for what no industry of his could prevent. But the true reason is, that the wife hath these inheritances which lie in grant, and not in livery, when the right first descends upon her; for she hath a thing in grant when she hath a right to it, and nobody else interposes to prevent it."

In *Davis* v. *Mason*, 1 Pet. 507, the foundation of the rule is thus stated in the opinion of the court: "As it relates to the tenure by curtesy, the necessity of entry grew out of the rule, which invariably existed, that an entry must be made in order to vest a freehold (Co. Lit. 51), and out of that member of the definition of the tenure by curtesy which requires that it should be inheritable by the issue. When a descent was cast, the entry of the mother was necessary, or the heir made title direct from the grandfather, or other person last seised."

A careful examination of the authorities makes it quite apparent that this is a correct statement of the principal, if not the only reason of

the rule. No other reason is found in the books, except the suggestion before referred to, that curtesy is refused where there was no actual seisin, because the husband might, by diligence, have obtained such seisin. But this idea, as we have seen, is not universally admitted.

Our next inquiry is, Do these reasons, or either of them, exist in Ohio?

That livery of seisin has never been essential in Ohio, to the creation of a freehold estate, nor an entry necessary to perfect the title of an heir or devisee, is well known to every lawyer. The most common instrument of conveyance is a deed of bargain and sale, which, without the aid of a Statute of Uses, transfers both the legal and equitable estate. Nay, further, a mere deed of quitclaim, or release, is sufficient, even where the releasee has no prior interest in the land. But our departure from the English law does not stop here; for an adverse possession does not prevent the transfer of title, either by deed, descent, or devise. Whatever title is held by the grantor, ancestor, or testator, may be thus transferred, notwithstanding the lands are adversely held by another. *Holt* v. *Hemphill*, 3 Ohio, 232; *Helfenstine* v. *Garrard*, 7 Ohio (pt. 1), 275; *Hall* v. *Ashby*, 9 Ohio, 96. It might seem, from what was said in *Holt* v. *Hemphill*, that an adverse possession would be fatal to a deed; but that such possession in no wise affects it, was expressly decided in *Hall* v. *Ashby*.

As, then, a freehold estate is created in Ohio without entry, it is manifest that the principal, if not the only, reason of the rule requiring actual seisin to give curtesy does not exist in this State.

But allowing that the minor reason before stated did exist in England, does it exist here? Ought a husband to be denied curtesy in Ohio upon the ground that he might have entered upon the land during coverture, and that if he did not, he was guilty of a fault that deservedly bars his right? There may have been much reason for saying so in England, when the rule requiring seisin was established; for by the failure of the husband to enter, the wife and her issue might lose the estate, which it was plainly his duty to prevent if possible. But in Ohio her title is as perfect before as after entry; and, in general, it would be nothing less than absurd to make a man's right depend upon whether he had gone for a moment upon the land and "broken a twig," or "turned a sod," or "read a deed." There is, however, one case, and perhaps but one, in which, if curtesy exists, the heirs of the wife might be prejudiced by a failure of the husband to obtain possession, namely, when by such failure the bar of the Statute of Limitations becomes perfect against them. But this would probably occur so rarely as to furnish but a slight foundation for the rule we are considering. Nor is it the only case in which a remainder-man, or reversioner, may be powerless to preserve his estate. If A, the owner in fee of lands in the adverse possession of B, devise or convey them to C for life, with remainder to D, it is manifest that, as the Statute of Limitations began to run against A, and therefore continues to run against C and D, the latter may lose his

estate through the neglect or failure of C to obtain possession. So, when the Statute begins to run against a *feme sole*, and she afterward marry, she may lose her land by the neglect or inability of her husband to recover it.

These possible cases of hardship it is the province of legislation to guard against, and not of the courts. Were we to say that there shall be no curtesy where the possession was held adversely during the coverture, because to give it might, by possibility, result in the loss of the estate to the heir, it is very probable that, in guarding against hardships on the one side, we should open the door to quite as much, or more, hardship on the other. For it is very far from being true that the failure to obtain possession during the coverture, is always attributable to the husband's neglect. He may have freely spent his time, labor, and money to recover the land, and yet, without any fault of his, be unable to succeed in the lifetime of the wife. Decide as we may, and doubtless there will be room for cases of hardship to arise; but, as was truly said by Duncan, J., in *Stoolfoos* v. *Jenkins*, 8 S. & R. 173; "Courts cannot usurp legislative functions, or new-model the law according to their own ideas of natural justice, or redress hardships in each particular instance." And it is never to be forgotten that all wise laws are framed with a regard to what is likely to occur, rather than to that which is only possible.

On the whole, the conclusion to which we have arrived is, that neither of the reasons given for making actual seisin indispensable to curtesy, affords any sufficient foundation for the rule in Ohio.

It remains to be considered whether, the reason of the rule having ceased, or rather never having existed, in this State, the rule itself exists here. Tenancy by the curtesy has always been known to our law, and is recognized by our Statutes. We cannot deny its existence; but may we not deny the necessity of a requisite, that properly enough formed a place in the common law, but has no reason to support it in our jurisprudence? We are materially aided in this inquiry by the American decisions upon the subject of curtesy. These decisions may be reduced into three classes: —

1. Those in which, there being no adverse possession, the husband and wife were held to be *constructively* seised *in deed*, and such constructive seisin deemed sufficient.

2. Those in which, there was an adverse possession; but a recovery in ejectment, on the demise of the husband and wife, or the husband alone, took place during the coverture; and in which there was held to be curtesy, although no actual possession followed the recovery.

3. Those in which an adverse possession was decided to be no bar to curtesy.

Of the first class, *Jackson* v. *Sellick*, 8 Johns. 208, and *Davis* v. *Mason*, 1 Peters, 506, may properly, perhaps, be called the leading cases. Many others might be cited, for the general current of American authority certainly admits curtesy in this class of cases.

Of the second class, *Elisworth* v. *Cook*, 8 Paige, 643, is the leading case.

To the third class belong *Bush* v. *Bradley*, 4 Day, 298, approved in *Chew* v. *Comm'rs of Southwark*, 2 Rawle, 160, etc.

Now, a careful scrutiny of these cases will show that in nearly all of them the decisions were arrived at by an application of the maxim *Cessante ratione, cessat ipsa lex.* It was so expressly declared in *Davis* v. *Mason.* That case respected lands in Kentucky. After giving, in the passage hereinbefore quoted, the reason of the rule requiring seisin, the judge who delivered the opinion of the court went on to say: "But in Kentucky, we understand, the livery of seisin is unheard of. Freeholds are acquired by patent, or by deed, or by descent, without any further ceremonies; and in tracing pedigree, the proof of entry, as successive descents are cast, is never considered as necessary to a recovery, or in any mode affecting the course of descent. If a *right of entry* therefore exists, it ought by analogy to be sufficient to sustain the tenure acquired by the husband, where no adverse possession exists; as it is laid down in the books relative to a seisin in law, 'he has the thing, if he has a right to have it.' Such was not the ancient law; but the reason of it has ceased. It has been shown that in the most remote periods exceptions had been introduced on the same ground; and in the most modern, the rule has been relaxed upon the same consideration. We ought not to be behind the British courts in the liberality of our views on the subject of this tenure."

So in *Jackson* v. *Sellick* the court said: "We must take the rule (requiring seisin) with such a construction as the peculiar state of new lands in this country require."

Both these cases seem to proceed on the ground that the wife, though not actually, was yet *constructively* seised *in deed.* Hence the allusion, in each case, to the fact that there was no adverse possession to rebut the presumption. The question whether an adverse possession would be fatal to the claim to curtesy was not presented. The cases in effect decide, not that seisin in deed is indispensable, but that, if there must be seisin, a constructive seisin is sufficient. But in *Bush* v. *Bradley* the question was directly raised. The premises, during the whole period of the coverture, were adversely held by a third person. Yet the husband was adjudged to be tenant by the curtesy. The real estate law of Connecticut was, in all respects material to the present inquiry, the same as that of Ohio; and the court held that, as the reason of the rule requiring seisin did not exist, seisin was unnecessary, and that the symmetry of the law required this decision. To the same effect is the following language of the court in *Stoolfoos* v. *Jenkins*, 8 S. & R. 175: "The actual seisin of the husband during coverture is necessary to entitle him, as tenant by the curtesy, by the common law; though such actual seisin by the husband is not necessary by our law, if there be a potential seisin, *or right of seisin.* This has been decided to be sufficient in this State." This ruling, as well as the case of *Bush* v. *Bradley*,

was approved in the case in 5 Rawle, 160, before cited, the court holding that it was sufficient to entitle the husband to curtesy, that the wife owned the land and had a right "to demand and recover the immediate possession thereof."

In the light of these decisions, and the considerations upon which they rest, we can hardly err in holding that the reason, or reasons, of the rule requiring seisin in deed, having no existence in Ohio, the rule itself does not exist. And, certainly, the symmetry of our law demands this. It would be strange indeed, and only lead to confusion and perplexity, if, while every other tenancy may be created in this State without entry, or regard to the fact of adverse possession, a tenancy by the curtesy could not. Nor does a rule strongly commend itself to the good sense of men that makes the existence of the estate depend upon an almost, or quite, imaginary distinction between seisin in law and constructive seisin in deed. The constructive seisin relied on in *Jackson* v. *Sellick*, *Davis* v. *Mason*, and *Ellsworth* v. *Cook*, was *in substance* nothing but a seisin in law. It is a mere fiction to say that a man is actually possessed of that which is in no one's possession, and it is plainly untrue to say so when the thing is in the possession of another. The reasoning of the courts in all these cases, if carried to its legitimate result, makes seisin in deed, either actual or constructive, wholly unnecessary; and this result is not in conflict with the principles of the common law. For even at common law a seisin in law is sufficient to give curtesy in all inheritances created without entry. 3 Bac. Abr. 12; *Jackson* v. *Johnson*, 5 Cow. 98; *Ellsworth* v. *Cook*, 8 Paige, 643. It is therefore a mere application of a common law principle to say that a seisin in law is sufficient in Ohio, where in no case is an entry necessary to create an inheritance. In the case before us, Mrs. Borland was seised in law, for "seisin in law is a right to lands and tenements, though the owner is by wrong disseised of them." 6 Jacob's Law Dict. 41. Her husband, there being issue born, became tenant by the curtesy, and as he was yet in life when the ejectment was brought by her heirs, the Common Pleas did right to nonsuit them

The decision of this case also decides the case of *Doe ex. dem. Hunter et al.* v. *Durrell;* the only difference in the cases being that there was an adverse possession in the one, and not in the other.[1]

[1] Contra, *Mercer* v. *Selden*, 1 How. 37 (1843); *Den* d. *Hopper* v. *Demarest* 1 Zab. 525 (1848).

WATKINS *v.* THORNTON.

SUPREME COURT OF OHIO. 1860.

[*Reported* 11 *Ohio St.* 367.]

ERROR to the District Court of Scioto County.

The action below was brought under the code, by the defendants in error, to recover the possession of certain real estate. The facts of the case, as shown by an agreed statement of counsel, and the special finding of the District Court, are as follows: —

In October, 1847, John H. Thornton died testate, having devised the premises in controversy to his wife, Sally Thornton, for life, with remainder to his daughter, Sarah Ann Thornton, in fee simple.

The widow of the testator remained in possession of the premises, under the will, till her death, in December, 1851.

The daughter, Sarah Ann Thornton, intermarried, in June, 1848, with the plaintiff in error, Jefferson L. Watkins, by whom she had issue Ida Watkins, born during the coverture, in September, 1849.

Mrs. Watkins died in September, 1851, before the determination of the life estate of her mother, and her daughter Ida also died in March, 1855, leaving the defendants in error her heirs-at-law.

Upon this state of facts, the District Court held that the defendants in error were entitled to the possession of the premises, and accordingly rendered a judgment in their favor, which it is now sought to reverse on the ground that Watkins, the plaintiff in error, is entitled to the possession of the premises, as tenant by the curtesy. If this be not so, it is conceded that the judgment below must be affirmed.

A. G. Thurman and *W. A. Hutchins*, for plaintiffs in error.

H. A. Towne, for defendants in error.

SCOTT, C. J. By the common law there are four requisites necessary to make a tenancy by the curtesy: marriage, seisin of the wife, issue, and the death of the wife. As to the seisin requisite to the creation of this estate, it said by Blackstone, "The seisin of the wife must be an actual seisin, or possession of the lands; not a bare right to possess, which is a seisin in law, but an actual possession which is a seisin indeed. And, therefore, a man shall not be tenant by the curtesy of a remainder or reversion." 2 Bl. Com. 127. Such, beyond all question, is the rule of the common law as to corporeal hereditaments.

This rule, requiring actual seisin of the wife, was not applied to incorporeal hereditaments, for the good reason, that, from their nature, livery of seisin was impossible. As to inheritances of this kind, a seisin in law was deemed sufficient to entitle the husband to be tenant by the curtesy; because, as was said by Coke: "The wife hath those inheritances which lie in grant and not in livery, when the right first descends

upon her; for she has a thing in grant, when she has a right to it, and nobody else interposes to prevent it." But in respect to lands, inasmuch as the rule of the common law required actual seisin of the freehold, as well as a right to the inheritance, on the part of the wife, during the coverture, as a requisite to tenancy by the curtesy, the result stated by Blackstone necessarily followed, that a man could not be tenant by the curtesy of a reversion or remainder, where there was an outstanding estate of freehold in another. Such an estate, in expectancy merely, could, from its nature, confer no right of present possession. In adopting, in this country, from the common law, the tenancy by curtesy, the rules which prescribe the character or kind of estate to which it attaches, seem uniformly to have been regarded as also adopted. In the absence of statutory enactments, the common law, of which this estate is the creature, must furnish the rule on this subject. It is accordingly laid down by Kent in his Commentaries, that "if there be an outstanding estate for life, the husband cannot be tenant by the curtesy of the wife's estate in reversion or remainder, unless the particular estate be ended during the coverture." 4 Kent's Com. 28; *Stoddart* v. *Gibbs*, 1 Sumner, 263; *Blood* v. *Blood*, 23 Pick. 80; 7 Mass. R. 253; 5 N. Hamp. R. 469; *Mackey* v. *Proctor*, 12 B. M. 433; 1 Barb. Ch. Rep. 598; *Tayloe* v. *Gould*, 10 Barb. Sup. Ct. Rep. 388.

But the principal reason of the rule requiring actual seisin by the wife, in order to tenancy by the curtesy, is said by Blackstone to be, "because, in order to entitle the husband to such estate, he must have begotten issue that may be heir to the wife; but no one, by the standing rule of law, can be heir to the ancestor of any land whereof the ancestor was not actually seised." 2 Bl. Com. 128.

Though this principal reason of the rule no longer exists, even in England, yet it is said that the rule itself remains there, unaffected by the failure of its main reason. 2 Wend. Bla. 128, note 32. But in this country it has been frequently held otherwise. Where ownership, without seisin, regulates the descent of real estate, and gives the right to dispose thereof, either by deed or will, the rule requiring actual seisin in deed has been held not to apply. And in none of the States have the courts gone farther in this direction, than in our own. In *Lessee of Borland* v. *Marshall*, 2 Ohio St. Rep. 308, this court, proceeding on the maxim *Cessante ratione, cessat ipsa lex*, held, that inasmuch as seisin of the ancestor was never necessary to inheritance in this State; a husband may, therefore, be tenant by curtesy, though the wife was never seised in deed, either actually or constructively, of the lands, and though the same were adversely held, during coverture, by another person. The question was again examined, and this decision approved, in the case of *Merritt* v. *Horne*, 5 Ohio St. Rep. 308. In the former of these cases, the subject was very fully considered, and the conclusion arrived at by the court was said not to be "in conflict with the principles of the common law. For, even at common law, a seisin in law is sufficient to give curtesy in all inheritances created without entry.

3 Bac. 12; *Jackson* v. *Johnson*, 5 Cowen, 98; *Ellsworth* v. *Cook*, 8 Paige, 643. It is, therefore, a mere application of a common law principle, to say that a seisin in law is sufficient in Ohio, where in no case is an entry necessary to create an inheritance."

With the rule established by these cases, we are entirely satisfied. But we are now asked by the plaintiff in error to go much farther, and to hold that even a *seisin in law* by the wife, that is, *a right to possess the premises*, is not necessary to make the husband tenant by the curtesy. For in the present case, the life estate of Mrs. Thornton was outstanding at the death of her daughter, Mrs. Watkins, in right of whom the plaintiff in error claims the curtesy. It is clear, then, that Mrs. Watkins had not, during her life, a possession in deed, either actual or constructive, of the premises in controversy, nor had she any right to their possession. The actual seisin of the freehold was rightfully in her mother. In the case of *Borland's Lessee* v. *Marshall*, the wife had the right to the possession of the lands, though she was wrongfully disseised of them; and this, the court held to be sufficient, but at the same time carefully excluded the inference, which is now sought to be drawn from their reasoning. When they say the wife's right of possession is a sufficient seisin to give curtesy to the husband, the inference cannot be fairly drawn that even this right of possession is wholly unnecessary. Nor do we think their reasoning leads to this conclusion. For, admitting the reason assigned by Blackstone to be the sole reason for requiring actual possession of the lands by the wife, it does not follow that this is also the sole reason for requiring a *right* of present possession. An estate, which, from its nature, confers a *right of present possession*, may have been necessary for a general reason; while actual possession, or livery of seisin, may have been necessary for a further and special reason. The special reason requiring seisin in deed, has no existence in Ohio, and that part of the rule may, therefore, be properly held inapplicable, and yet the primary reason, or ground, on which tenancy by the curtesy rests, may be left in full force, and may require a seisin in law, that is a right of possession.

The origin of tenancy by the curtesy appears to be involved in obscurity, and resting as it does upon no clearly defined moral foundation, it must be regarded as the mere creature of the law. In the case of *Stoolfoos* v. *Jenkins*, 8 Serg. & Rawle, 175, it was said by the court (Duncan, J.), "The husband's interest in the land is not the land itself. Even if he had issue by her, he has but a life estate, and that only, in strictness, where he reduces it into possession, during the coverture. The actual seisin of the husband during coverture is necessary to entitle him, as tenant by the curtesy, by the common law; though such actual seisin by the husband is not necessary by our law, if there be a *potential* seisin, *or right of* seisin. This has been decided to be sufficient in this State. It is an excrescence of the wife's seisin. He is seised *in jure uxoris*. If it be a chattel of his wife's, it is his absolutely; if a chose

in action, and he reduces it into possession, it is his; but if he does not, and she survives him, it is hers."

The husband's right as tenant by the curtesy is a mere continuation of the right possessed during coverture, and the policy of the law is, in the main, similar both as to the wife's real and personal estate. The husband shall not, upon the death of the wife, be deprived of her chattels or choses in action, which he has reduced to possession during the coverture; nor, if he has had issue by her, for whose nurture and maintenance he has become chargeable, shall he be turned out of possession of her lands, which such issue might have inherited from her. But in either case, his rights are a mere continuation of those acquired during coverture, and can become no greater than they were during the wife's life. If, then, there was no right of present seisin in the wife during coverture, by reason of an outstanding estate of freehold in another, there could be no estate in possession, to be *continued* to the husband — and the inheritance of the wife, being an estate in expectancy only, must descend immediately to her heirs.

But it is said that Mrs. Watkins had a vested remainder in the premises, which was inheritable by her issue; or in other words, that she had seisin in law of an estate of inheritance, and that this case is therefore not distinguishable, upon principle, from the case of *Borland* v. *Marshall*. But we apprehend there is a clear and substantial distinction between a seisin in law of lands, which implies a right of present possession, and a seisin in law of an estate of inheritance, in expectancy, therein, which, in the case of an outstanding freehold, excludes all right of present possession. A distinction has always been taken in pleading, by the rules of the common law, between a reversion depending upon an estate for life, and one expectant on the determination of a lease for years. In the latter case the party might plead that he was seised *in his demesne as of fee*, but in the former he could only plead that he was seised *as of fee* (6 Jacobs' L. Dict. 41); Dyer, 185, 257. The former expression imported manual occupation, while the latter did not. The distinction is still more obvious where no estate of any kind intervenes to prevent present enjoyment of the inheritance. Where the estate consists of a rent, actual seisin, that is, receipt of the rent by the wife or the husband, during coverture, is not necessary, even in England, to give the husband a right by the curtesy. Still, there must have been, during coverture, a present right to receive the rent when it should become payable.

In Pennsylvania, while the rule of the common law requiring seisin in deed is rejected, because there, as well as here, the reason of it is inapplicable, yet the courts hold that there can be no tenancy by the curtesy of a remainder or reversion, expectant upon an estate for life, if the particular estate continue till the death of the wife. *Chew* v. *Com. of Southwark*, 5 Rawle, 160. In this case, the court said: "It is not necessary to entitle a husband to claim by the curtesy in this State, that there should have been, what is considered in England, an

actual seisin of the wife, or the husband, during the coverture. It is sufficient if she were invested with the title to an estate of inheritance, and had seisin of the freehold thereof in law, by having a right to demand and receive the rent accruing from the enjoyment of it, either by a tenant at will or for a term of years, if out of lease; or otherwise to demand and recover the immediate possession thereof; or as the late Mr. Justice Duncan expresses it in *Stoolfoos* v. *Jenkins*, 8 Serg. & Rawle, 175, "if there was a potential seisin or right of seisin. . . . But still," say the court, "there must be a seisin of the freehold, as well as a right to the inheritance, during the coverture, or what shall be deemed equivalent thereto, having regard to the nature of the estate.

The rule of the common law has thus been substantially preserved, as well in this State as in others. And to change it, in matter of substance, by giving the husband a right by the curtesy, where there has been, during coverture, not even a potential seisin of the freehold, would be the exercise of legislative power. And so long as a right of seisin of the freehold is necessary to give dower to the wife, it is not easy to assign a satisfactory reason why the counter estate by the curtesy should be more favored. At all events, we can but declare what the law is.

The judgment of the District Court must be affirmed.

SUTLIFF, PECK, GHOLSON, and BRINKERHOFF, JJ., concurred.

NOTE. — On curtesy in equitable estates, see Ames, Cases on Trusts, 480–487.

CHAPTER II.

DOWER.

NOTE. — On the subject of this chapter consult Scribner on Dower.

SECTION I.

NATURE OF DOWER.

LIT. § 36. Tenant in dower is, where a man is seised of certain lands or tenements in fee simple, fee tail general, or as heir in special tail, and taketh a wife, and dieth, the wife after the decease of her husband shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture, to have and to hold to the same wife in severalty by metes and bounds for term of her life, whether she hath issue by her husband or no, and of what age soever the wife be, so as she be past the age of nine years at the time of the death of her husband, otherwise she shall not be endowed.

LIT. § 37. And note, that by the common law the wife shall have for her dower but the third part of the tenements which were her husband's during the espousals; but by the custom of some county, she shall have the half, and by the custom in some town or borough, she shall have the whole; and in all these cases she shall be called tenant in dower.

LIT. § 38. Also, there be two other kinds of dower, viz., dower which is called dowment at the church door, and dower called dowment by the father's assent.

LIT. § 39. Dowment at the church door is, where a man of full age seised in fee simple, who shall be married to a woman, and when he cometh to the church door to be married, there, after affiance and troth plighted between them, he endoweth the woman of his whole land, or of the half, or other lesser part thereof, and there openly doth declare the quantity and the certainty of the land which she shall have for her dower. In this case the wife, after the death of the husband, may enter into the said quantity of land of which her husband endowed her, without other assignment of any.

LIT. § 40. Dowment by assent of the father is, where the father is seised of tenements in fee, and his son and heir apparent, when he is married, endoweth his wife at the monastery or church door, of parcel of his father's lands or tenements with the assent of his father, and assigns the quantity and parcels. In this case after the death of the

son, the wife shall enter into the same parcel without the assignment of any. But it hath been said in this case, that it behooveth the wife to have a deed of the father to prove his assent and consent to this endowment.

Lit. § 41. And if after the death of her husband she entereth, and agree to any such dower of the said dowers at the church door, &c. then she is concluded to claim any other dower by the common law of any the lands or tenements which were her husband's. But if she will, she may refuse such dower at the church door, &c. and then she may be endowed after the course of the common law.

Lit. § 53. And also, in every case where a woman taketh a husband seised of such an estate in tenements, &c. so as by possibility it may happen that the wife may have issue by her husband, and that the same issue may by possibility inherit the same tenements of such an estate as the husband hath, as heir to the husband, of such tenements she shall have her dower, and otherwise not. For if tenements be given to a man, and to the heirs which he shall beget of the body of his wife, in this case the wife hath nothing in the tenements, and the husband hath an estate but as donee in special tail. Yet if the husband die without issue, the same wife shall be endowed of the same tenements; because the issue, which she by possibility might have had by the same husband, might have inherited the same tenements. But if the wife dieth, living her husband, and after the husband takes another wife, and dieth, his second wife shall not be endowed in this case, for the reason aforesaid.

Note. — On dower in the United States see 1 Scrib. Dow. *c.* 2.

SECTION II.

PROPERTY AND ESTATES SUBJECT TO DOWER.

Perk. § 366. And it is to know, that the husband by his act may prejudice the wife in her dower by his laches of entry, by his laches of suit, or by his laches of pleading, and by divers other acts as shall be said: Know, that when no possession was in the husband, either in deed or in law during the marriage; there the laches of entry of the husband shall prejudice the wife of dower, if not that it be in special cases; and therefore if a man seised of one acre of land in fee, be disseised of the same acre, and taketh a wife and dieth before his entry, his wife shall not have dower.

Perk. § 367. And if a man dieth seised in fee, and a stranger doth abate in the same land, and after the abatement the heir marrieth a wife, and dieth before his entry, his wife shall not have dower of the same land.

PERK. § 368. And if a man enfeoff a stranger upon condition on the part of the feoffee, and the feoffor marrieth a wife, and the condition is broken, and the feoffor dieth before any entry made by him, or by any other in his name, his wife shall not have dower of the same land.

PERK. § 369. And if J. S. seised in fee of one acre of land, exchange the same acre with T. K. for another acre in fee, and J. S. entereth and executeth the exchange, for his part, viz. for the acre which was put in exchange to him, and T. K. taketh a wife, and dieth before that he entereth by force of the exchange, his wife shall not have dower of the one acre, or of the other, &c. And the reason is, because the husband was not seised of that land, either in deed or in law, during the marriage betwixt them, &c.

PERK. § 370. And if a man hath judgment for to recover land, &c. and marrieth a wife, and dieth before entry or execution sued, his wife shall not have dower, &c. But if the husband be seised in deed, or in law, during the marriage, then his laches of entry shall not prejudice the wife of her dower.

PERK. § 371. And therefore, if there be lord and tenant, and the lord marrieth a wife, and the tenant dieth without heir, and a stranger abateth, and the lord dieth before his entry, his wife shall have dower of the tenancy.

PERK. § 372. And if land be leased for life, the remainder unto J. S. in fee, and J. S. marrieth a wife, and the lessee dieth, and a stranger entereth, and J. S. dieth before any entry made by him, &c. his wife shall have dower of the same land, &c. And if a man be seised of a villein in gross in fee, and the lord of the villein hath issue a son, which son marrieth a wife, and the father dieth, and the son dieth before any seisure of the villein, yet his wife shall be endowed of the villein, &c.

CO. LIT. 31 a. Here this word (seised) extendeth itself as well to a seisin in law, or a civil seisin, as to a seisin in deed, which is a natural seisin: but seised he must be either the one way or the other during the coverture. For a woman shall be endowed of a seisin in law. As where lands or tenements descend to the husband, before entry, he hath but a seisin in law, and yet the wife shall be endowed, albeit it be not reduced to an actual possession, for it lieth not in the power of the wife to bring it to an actual seisin, as the husband may do of his wife's land, when he is to be tenant by curtesy, which is worthy the observation. And yet of every seisin in law, or actual seisin of lands or tenements, a woman shall not be endowed. For example, if there be grandfather, father, and son, and the grandfather is seised of three acres of land in fee, and taketh wife, and dieth, this land descendeth to the father, who dieth either before or after entry, now is the wife of the father dowable. The father dieth, and the wife of the grandfather is endowed of one acre and dieth, the wife of the father shall be endowed only of the two acres residue, for the dower of the grandmother is para-

mount the title of the wife of the father, and the seisin of the father which descended to him (be it in law or actual) is defeated, and now upon the matter the father had but a reversion expectant upon a freehold, and in that case, *Dos de dote peti non debet;* although the wife of the grandfather dieth living the father's wife. And here note a diversity between a descent and a purchase. For in the case aforesaid, if the grandfather had enfeoffed the father, or made a gift in tail unto him, there in the case abovesaid, the wife of the father, after the decease of the grandfather's wife, should have been endowed of that part assigned to the grandmother, and the reason of this diversity is, for that the seisin, that descended after the decease of the grandfather to the father, is avoided by the endowment of the grandmother, whose title was consummate by the death of the grandfather; but in the case of the purchase or gift, that took effect in the life of the grandfather (before the title of dower of the grandmother was consummate), is not defeated, but only *quoad* the grandmother, and in that case there shall be *Dos de dote.* And yet there is another diversity where the wife of the father is first endowed, and where the wife of the grandfather; for in the same case after the decease of the grandfather and father the son entereth and endowed his mother of a third part, against whom the grandmother recovereth a third part and dieth, the mother shall enter again into the land recovered by the grandmother, because she had in it an estate for term of her life, and the estate for the life of the grandmother is lesser in the eye of the law, as to her, than her own life. Also the husband may be seised in his demesne, as of fee absolutely, yet the woman shall not be endowed, as she shall not be endowed both of the land given in exchange, and of the land taken in exchange, and yet the husband was seised of both, but she may have her election to be endowed of which she will.[1]

Also of a seisin for an instant a woman shall not be endowed; as if *Cestui que use* after the Statute of 1 R. 3, and before the Statute of 27 H. 8, had made a feoffment in fee, his wife should not be endowed.

Likewise if two jointenants be in fee, and the one maketh a feoffment in fee, his wife shall not be endowed. And so if the conusee of a fine doth grant and render the land to the conusor, the wife of the conusee shall not be endowed, for it is not possible that the husband could have endowed his wife of such an estate, as the usual pleading is, *Lib. Intrat.* 225. *Quia dicit quod W. quondam vir suus nunquam fuit seisitus de tenementis prædictis de tali statu ita quod eandem A. inde dotasse potuit.*

Co. Lit. 32 a. Albeit of many inheritances that be entire, whereof no division can be made by metes and bounds, a woman cannot be endowed of the thing itself, yet a woman shall be endowed thereof in a special and certain manner. As of a mill a woman shall not be endowed by metes and bounds, nor in common with the heir, but either she may be endowed of the third toll-dish, or *de integro molendino per*

[1] But cf. *Cass* v. *Thompson*, 1 N. H. 65 (1817).

quemlibet 3 *mensem*. And so of a villein, either the third day's work, or every third week or month. A woman shall be endowed of the third part of the profit of stallage, of the third part of the profits of a fair, of the third part of the profits of the office of the marshalsea, of the third part of the profits of the keeping of a park, of the third part of the profit of a dove-house, and likewise of the third part of a piscary, *viz.*, *tertium piscem vel jactum retis tertium;* of the third presentation to an advowson. A writ of dower lieth *de* 3 *parte exituum proventientium de custodia gaolæ Abathiæ Westm.* And herewith agreeth reverend antiquity. *De nullo, quod est sua natura indivisibile et secutionem sive divisionem non patitur, nullam partem habebit, sed satisfaciat ei ad valentiam.* Of the third part of profits of courts, fines, heriots, &c. Also a woman shall be endowed of tithes; and the surest endowment of tithes is of the third sheaf; for what land shall be sown is uncertain.

But in some cases of lands and tenements, which are divisible, and which the heir of the husband shall inherit, yet the wife shall not be endowed. As if the husband maketh a lease for life of certain lands, reserving a rent to him and his heirs, and he taketh wife and dieth, the wife shall not be endowed, neither of the reversion (albeit it is within this word "tenements") because there was no seisin in deed or in law of the freehold nor of the rent, because the husband had but a particular estate therein, and no fee simple. But if the husband maketh a lease for years, reserving a rent, and taketh wife, the husband dieth, the wife shall be endowed of the third part of the reversion by metes and bounds, together with the third part of the rent, and execution shall not cease during the years. And herewith agreeth the common experience at this day. But if the husband maketh a gift in tail, reserving a rent to him and his heirs, and after the donor taketh wife and dieth, the wife shall be endowed of this rent, because it is a rent in fee, and by possibility may continue forever.

Of a common certain a woman shall be endowed, but of a common *sauns nomber en grosse* she shall not be endowed, as hath been said before. And so of a rent service, rent charge, and rent seek, she shall be endowed: but of an annuity that chargeth only the person, and issueth not out of any lands or tenements, she shall not be endowed. But if the freehold of the rents, common, &c. were suspended before the coverture, and so continue during the coverture, she shall not be endowed of them. If after the coverture the husband doth extinguish them by release or otherwise, yet she shall be endowed of them; for as to her dower they in the eye of the law have continuance.

AMCOTTS *v.* CATHERICH.

King's Bench. 1621.

[*Reported Cro. Jac.* 615.]

Trespass by *quo minus* in the Exchequer, for lands in Penchard, in the county of Durham. Upon not guilty pleaded, and a special verdict found at the Assizes in Durham, the case was, That husband and wife, tenants in special tail, had issue, and the wife dies; Matthew Amcotts the husband makes a deed of feoffment to the use of himself for life, and after to the use of Alexander his son in tail, and a letter of attorney to make livery: before livery is made he takes Susan to wife, and after livery was made to those uses, the husband dies; the tenant endows Susan, who takes the defendant to husband; Alexander the son enters, and brings trespass.

The question was, Whether this dower was well assigned? This case was argued at the Exchequer bar two several terms.

The first question was, Whereas a husband, tenant in special tail with his wife, having issue by her, and she dies, and he taking a second wife makes a feoffment, Whether this second wife be dowable of this possession, and that the assignment of dower to her were good?

The second question, Admitting she were dowable, yet inasmuch as this livery was made upon a deed of feoffment, sealed before the coverture, yet executed after, to the use of the husband for life, Whether she be now dowable?

It was resolved, and so adjudged, that she is not dowable: for this livery doth not gain to the husband any new estate; but being *eodem instanti* drawn out of him, it doth not gain to him any seisin whereof his wife is dowable: for at the first, before his feoffment, he had not any estate whereof the wife was dowable, being such a tenant in tail, that his issue by his second wife could not inherit, 44 Edw. 3 pl. 24; 46 Edw. 3 pl. 24: then when he hath not any estate before the feoffment whereof the wife was dowable, he hath not by his feoffment gained any such estate to make her dowable; as where tenant for life makes a feoffment, as 3 Hen. 4, pl. 6, or a jointenant makes a feoffment, as 34 Edw. 1; "*Dower*," 178. — And *Tanfield* cited, that it was adjudged, where a married man took a fine, and by the same fine rendered the land to another in tail, his wife shall not be endowed thereof; because although he took it in fee, yet it is instantly out of him: wherefore here, &c. And for the other point it is not now questionable. — Wherefore it was adjudged for the plaintiff.

NOEL *v.* JEVON.

CHANCERY. 1678.

[*Reported Freem. Ch.* 43.]

THE bill was to be relieved against the defendant's dower, her husband being only a trustee; and it appearing that the husband was but a trustee, the defendant was barred of her dower, contrary to the opinion of *Nash* v. *Preston*, Cro. Car. 191, and so it was said is the constant practice of the court now.[1]

BOTTOMLEY *v.* FAIRFAX.

CHANCERY. 1712.

[*Reported Ch. Prec.* 336.]

IN this case it was clearly agreed that if a husband before marriage conveys his estate to trustees and their heirs, in such manner as to put the legal estate out of him, though the trust be limited to him and his heirs, that of this trust estate the wife after his death shall not be endowed, and that this court hath never yet gone so far as to allow her dower in such case.[2]

STOUGHTON *v.* LEIGH.

KING'S BENCH. 1808.

[*Reported* 1 *Taunt.* 402.]

THIS was a case directed out of the High Court of Chancery for the opinion of this court: the facts were in substance as follow:

John Hanbury was in his lifetime, and during his marriage, and at his death, actually seised of divers landed estates, and of several mines and strata of lead and coal: namely, in his own land, a lead mine and a coal mine, neither opened, wrought or demised. Two lead mines and two coal mines, which, during the coverture, he had demised to tenants for years, reserving pecuniary rents, to be paid whether they did, or did not open and work them; and of each sort of these one had been opened before his death, by the tenant, who still continued now to work it; and the other had not been opened; a lead mine and a coal mine which he had demised during the coverture to tenants for years, rendering not

[1] See Ames, Cases on Trusts, 591, and *Oldham* v. *Sale*, 1 B. Mon. 76 (1840).

[2] See Ames, Cases on Trusts, 476; 1 Scrib. Dow. *cc.* 19–22.

pecuniary rents, but quantities of the lead ore and coal when gotten, and the tenants were by the terms of their leases at liberty to work or not to work these mines; the coal mine was at the time of John Hanbury's death, and of this suit, wrought by the tenant; the lead mine had not been opened; and two lead mines and two coal mines, which had been opened and were wrought by the deceased himself at the time of his death, one of each sort of which mines had, from the time of his death, ceased to be wrought, his heir thinking them unprofitable: the other of each sort the heir continued to work to profit. The first question was, whether John Hanbury's widow were entitled to dower of all, or any, and which of these mines, and what the widow could claim to be legally assigned to her thereout as her dower? The deceased was also entitled to the following minerals lying under land, which was not his own, but wherein he had purchased of the landowner liberties to work through his land: namely, a mine or stratum of coal, and another of lead ore, which he had opened and wrought during the coverture, and was working at the time of his death, since which the heir had ceased to work the lead, but continued to work the coal: a mine or stratum of lead, and another of coal, which he had not opened or wrought; a mine or stratum of lead, and another of coal, which he had demised to tenants for years, rendering at their own option, which they might annually make, either pecuniary rents or rents in kind, commencing from the time when the mines should be wrought. The lead mine had been opened before the death of John Hanbury, and the tenants had paid their rents in ore in kind. The coal mine had not been opened. nor was yet opened.

In case the court should be of opinion, that the widow was entitled to dower in any of the cases mentioned in the first question, the next question for the opinion of the court was, whether she was entitled to dower of all, or any, and which of the mines, strata, or rents secondly above mentioned, and what she could legally claim to be assigned to her, as her dower thereof?

Lastly, soon after John Hanbury's death, the heir let the widow into possession of, and assigned to her for her dower of an estate called (A), certain closes of land, in which there was an open coal mine, wrought at a certain period during the coverture, but which had ceased to be wrought long before the husband's death: and the value of the closes was amply sufficient to answer any demand of dower, without regard to the value of the coal. The widow had, since her husband's death, begun to work this mine, and had retained the profit to her own exclusive use.

The third and further questions, for the opinion of the court, were, whether the widow was in law entitled in virtue of her interest of dower, or for any other reason, to work this mine, for her own exclusive use and benefit?

Taking the assignment of these closes, as the widow's dower, to be the act of the heir himself, and to have been a most excessive assignment

in point of value, had the heir by law any and what remedy against the dowress, as against the effect of his own act?

If this assignment had not been his own act, but had been made in the course of legal proceedings under a writ of dower, would the heir by law, have any, and what remedy against the effect of such assignment?

This case was argued by *Shepherd* and *Best*, Serjeants, on behalf of the dowress.

Lens, Serjeant, *contra*.

Mansfield, C. J. The grant of the stratum must be taken to be a grant in fee-simple. In the course of the discussion I was strongly struck with the argument used for the heir, that Lord Coke has in 1 Inst. 32, enumerated all the species of inheritance of which a woman shall be endowed: and I thought it extraordinary that no mention should be made of mines. But upon referring to the passage, it appears to be no enumeration of all the things whereof a woman shall be endowed. Nothing like it: in the 36th section, upon which this passage is a commentary, Littleton says, the wife shall be endowed of all lands and tenements of which her husband was seised. Lord Coke says not a word to explain what is land or what is a tenement, thinking the import of those terms well known in the law. But the intention of the passage is, to show, that though all lands and tenements are subject to dower, and assignment is to be made by metes and bounds where it can, yet it is no impediment to dower that the tenements are of such a nature, as that they cannot be assigned by metes and bounds; but in those cases it shall be assigned as well as it can be, as by the third toll-dish of a mill, or the like. In the preceding chapter, which is of tenant by the curtesy, Littleton does not mention of what the wife must be seised; and Lord Coke, 29 b, speaks of lands only, but Littleton, § 52, speaks of tenements. The words in both cases must receive the same exposition: and it is only necessary to see whether this species of property be land or a tenement. Comyn, and the other digests which have been cited, only follow the words of Co. Lit., the reason of whose authority is above stated. In the case of trees there is a profit in the shade and pannage, but in the case of a mine, the working it is the only mode in which it can be enjoyed.

A second argument was prayed on behalf of the heir, which the court refused, thinking the case sufficiently clear.

The court certified to the High Court of Chancery that their opinion upon the questions proposed to them, arising from the first and second statements in the case, was, that the widow of John Hanbury was dowable of all his mines of lead and coal, as well those which were in his own landed estates as the mines and strata of lead or lead ore and coal in the lands of other persons, which had in fact been open and wrought before his death, and wherein he had an estate of inheritance during the coverture; and that her right to be endowed of them had no

dependance upon the subsequent continuance or discontinuance of working them, either by the husband in his lifetime, or by those claiming under him since his death.

They thought too that her right of dower of such mines, &c., could not be in any respect affected by leases made by the husband during the coverture; but if any of the existing leases for years were made by the husband before marriage, then the endowment (if made of the mines), must be of the reversions and of the rents reserved by such leases as incident to the reversions; in which case they thought the widow would be bound so long as the demises continued, to take her share of the renders, whether pecuniary or otherwise, according to the terms of the respective reservations. They were also of opinion that the widow was not dowable of any of the mines or strata which had not been opened at all, whether in lease or not.

In assigning the dower of Mr. Hanbury's own lands, the sheriff must estimate the annual value of the open mines therein as part of the value of the estates of which the widow is dowable; but it was not absolutely necessary that he should assign to her any of the open mines themselves, or any portions of them. The third part in value which he should assign to her might consist wholly of land set out by metes and bounds, and containing none of the open mines. Or he might include any of the mines themselves in the assignment to the widow, describing them specifically if the particular lands in which they lie should not also be assigned; but if those lands should be included in the assignment, the open mines within them might, but were not necessarily to be so described, being part of the land itself which was assigned; and as the working of open mines was not waste, the tenant in dower might work such mines for her own exclusive profit. Or the sheriff might divide the enjoyment and perception of the profits of any of the particular mines as after-mentioned.

In regard to the mines and strata which Mr. Hanbury had in the lands of other persons, they were of opinion that it was not necessary that the sheriff should divide each of the mines or strata; but he might assign such a number of them as might amount to one-third in value of the whole, or he might proportion the enjoyment of such of them as he should think necessary, so as to give each a proper share of the whole.

If the division of an open mine could be made by metes and bounds, as lands are required to be divided without preventing the parties from having the proper enjoyment and perception of the profits, they thought that mode should be adopted; but as the property seemed to them to be incapable of a beneficial severance in that way, they thought the case analogous to some of those stated by Lord Coke, 1 Inst. 32 a; wherein it is held that the sheriff may make the assignment in a special manner; and that therefore he might so proceed with respect to the mines in question. They found no authority, however, establishing any precise mode of dividing a mine, nor could they point out any that might not be attended with inconvenience; but if the sheriff was to make the

assignment, they thought he might lawfully execute his duty by directing separate alternate enjoyment of the whole for short periods, proportioned to the share each had in the subject, or by giving the widow a proportion of the profits.

In answer to the last question proposed to them, they were of opinion that the widow was entitled to work for her own exclusive use the open mine within the close that had been assigned to her without any exception of the mine, for her dower of one of the estates, notwithstanding the excess arising from the omission of such exception; and inasmuch as the assignment was the act of the heir himself, being of full age at the time, they thought he had no remedy at law against the dowress for avoiding the consequences of that act. Had he been under age at the time, he might have had relief by writ of admeasurement of dower; or had the assignment been made by the sheriff in execution of a judgment in dower, the heir might have had a *scire facias* to obtain an assignment *de novo*.[1]

STANWOOD *v.* DUNNING.

Supreme Judicial Court of Maine. 1837.

[*Reported* 14 *Me.* 290.]

This was an action of *dower*, and was submitted to the opinion of the court from an agreed statement of facts. From this it appeared that David Stanwood, the husband of the demandant, was the son of William Stanwood, and they had both died before the demand of dower in this action. A deed of the premises in which dower is claimed was made from William to David, dated March 1, 1824, and acknowledged, March 6, 1824. David Stanwood conveyed the same premises to Charles Stanwood by deed dated March 6, 1824, and acknowledged the same day, both of which deeds were executed at the same time and place, although bearing different dates. The marriage before the time the deed was made to David, and demand of dower, were admitted. The defendants claim under conveyances from Charles Stanwood. It was agreed, that the object of the father was to divide the estate between the sons; that Charles gave David his notes for the farm at the same time, and that David was notoriously insolvent, and that all appeared to be done according to previous arrangement between the parties. If admissible, on objection made by defendants, the plaintiff can prove by parol, that this arrangement was made merely to protect the property from David's creditors, so that it might be held for his benefit, and that of his family; that the witness knew this fact from conversations with William, David, and Charles; that the farm was once in the hands of the witness, and that when he sold it he tried

[1] As to dower in wild lands, see 1 Scrib. Dow. c. 10, §§ 11-21.

to obtain a release from the plaintiff of her right of dower, but could not, and in consequence thereof sold the premises for $1200 less than he otherwise should have had, and that he sold subject to her right. It was also agreed, if the paper is admissible in evidence, that on the same 6th of March, 1824, Charles Stanwood gave a life lease in the same premises to the said William Stanwood. The only question raised, was whether the plaintiff was entitled to dower in the premises.

The case was argued in writing.

Willis and *Fessenden*, for the demandant.

Mitchell, for the defendants.

After a continuance for advisement, the opinion of the court was drawn up by

EMERY, J. The only question in this case is, whether on the facts legally and properly proved, David Stanwood had such seisin of the premises as could entitle the demandant to dower. Premising, that family settlements made without fraud, are justly entitled to the favorable consideration of courts, we proceed to suggest our ideas of the merits of the case, as disclosed in the agreed statement of facts. The claim of dower, it has long been said, is to be favored. Still unless the husband were legally and beneficially seised of the estate during the coverture, the wife is not entitled to dower. But if the land vests in the husband but for a single moment beneficially for his own use, the wife shall be endowed.

It is said, that the case cited by plaintiff from Cro. Eliz., 503, which is *Broughton* v. *Randall*, is differently reported in Noy, 64. In Cro. Eliz. it is said, the title of the *feme* to recover dower was, that the father and son were joint-tenants to them, and the heirs of the son; and they were both hanged in one cart; but because the son, as was deposed by witnesses, survived, as appeared by some tokens, viz. his shaking his legs, his *feme* thereupon demanded dower, and upon this issue, *nunques seisie dower*, this matter was found for the demandant.

In Roper on Property, 1st vol. 369, the case of *Broughton* v. *Randall* is thus stated. A father was tenant for life, remainder to his son in tail, remainder to the right heirs of the father. Both of them were attainted of felony and executed together. The son had no issue, and the father left a widow. Evidence was given of the father having moved or struggled after the son, and the father's widow claimed dower of the estate, and it was adjudged to her. The principle appears to be this: that the instant the father survived the son, the estate for life of the father, united with the remainder in fee limited to him upon the determination of the vested estate tail in the son, so that the less estate having merged in the greater, the father became seised of the freehold and inheritance for a moment during the marriage, to which dower attached itself.

But if the instantaneous seisin be merely transitory, that is, when the very same act by which the husband acquires the fee, takes it out of him, so that he is merely the conduit for passing it, and takes no interest, such a momentary seisin will not entitle his widow to dower.

An illustration is given in the English books, that if lands be granted to the husband and his heirs by a fine, who immediately by the same fine renders it back to the conusor, the husband's widow will not be entitled to dower of such an instantaneous seisin. *Dixon* v. *Harrison*, Vaughan, 41 ; Cro. Car. 191 ; Co. Lit. 31.

In this case, the marriage, death of the husband, and demand of dower are admitted, but his seisin is denied.

Without going into an examination of the law relating to the four species of fines used in England, we may remark, that it is considered there as one of the most valuable of the common assurances of that realm, being in fact a fictitious proceeding, to transfer, or secure, real property, by a mode more efficacious than ordinary conveyances. 1 Co. Lit. 121 a.

But to show how this mode of passing property bears on the seisin of the husband, so far as instantaneous in the case of a fine, compared with it in case of bargain and sale, the case of *Nash* v. *Preston*, Cro. Car. 191, is not inappropriate. It was a bill in chancery. "J. S. being seised in fee, by indenture enrolled, bargains and sells to the husband for £120, in consideration, that he shall re-demise it to him and his wife for their lives, rendering a peppercorn ; and with a condition, that if he paid the £120 at the end of 20 years, the bargain and sale shall be void. He re demiseth it accordingly and dies ; his wife brings dower. The question was, whether the plaintiff shall be relieved against this title of dower. Jones, J., and Croke, to whom the bill was referred, conceived it to be against equity and the agreement of the husband at the time of the purchase, that she should have it against the lessees, for it was intended that they should have it re-demised immediately to them, as soon as they parted with it ; and it is but in nature of a mortgage ; and upon a mortgage, if land be re-demised, the wife of the mortgagee shall not have dower. And if a husband take a fine *sur cognizance de droit comme ceo*, and render arrear, although it was once the husband's, yet his wife shall not have dower, for it is in him and out of him *quasi uno flatu*, and by one and the same act. Yet in this case, they conceived, that by the law she is to have dower ; for by the bargain and sale, the land is vested in the husband, and thereby his wife entitled to have dower ; and when he re-demises it upon the former agreement, yet the lessees are to receive it subject to this title of dower ; and it was his folly, that he did not conjoin another with the bargainee, as is the ancient course in mortgages. And when she is dowable by act or rule in law, a court of equity shall not bar her to claim her dower, for it is against the rule of law, viz. "where no fraud or covin is, a court of equity will not relieve." And upon conference with other the justices at Serjeant's Inn, upon this question, who were of the same judgment, Jones and Croke certified their opinion to the Court of Chancery, "that the wife of the bargainee was to have dower, and that a court of equity ought not to preclude her thereof."

The case of *Holbrook* v. *Finney*, 4 Mass. R. 566, recognizes that which we have just recited as sound law.

In the case now under discussion, the deed from William Stanwood to David Stanwood bears date the 1st of March, 1824, is acknowledged on the 6th of the same month, and recorded March 16th, 1824. It is a deed of bargain and sale to said David in fee for the consideration of love and affection with general warranty.

The deed from David Stanwood to Charles Stanwood is dated the 6th of March, 1824, acknowledged the same day, and recorded March 11th, 1824. But if requisite so to examine in order to help to a decision, it is manifest from inspecting the deed from William to Charles Stanwood, that in the order of time the deed to David from William was made first, and then it is apparent that David became rightfully seised in fee, and beneficially so, though for a short time.

The fee was not rendered back by David to William, *quasi uno flatu*, and therefore the demandant is entitled to dower. It is agreed that the object of the father was to divide his estate among his sons. Nothing could more strongly evince the propriety of leaving the law to raise the future benefit to the wife of David in dower after his decease, if his notorious insolvency might put at hazard the beneficial continuance of the property in him during his life.

The questions about the admissibility of any other evidence of former or subsequent agreements and conversations, it is unnecessary to examine further than to say, that those which preceded the deed of William to David were merged in that conveyance. And the subsequent agreements and conversations do not abridge the plaintiff's right. But we reject them. The purchasers under Charles Stanwood are estopped to deny the seisin of David. *Kimball* v. *Kimball*, 2 Greenl. 226.

Upon every view of which the case is legally susceptible, on the facts legally and properly proved, we are satisfied that David Stanwood had such seisin of the premises, as would entitle the demandant to dower.

The defendants must be defaulted.[1]

ADAMS *v.* HILL.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1854.

[*Reported* 9 *Fost.* 202.]

GILCHRIST, C. J.[2] The plaintiff claims dower in certain lands in Greenland.

Taking the deeds mentioned in the case in the order of time, it appears that on the 2d day of June, 1821, Parrott conveyed to Adams certain lands in Lancaster, and on the 9th of June Adams conveyed

[1] Cf. *McCaulay* v. *Grimes*, 2 G. & J. 318 (1800).

[2] Only the opinion is here given.

them to Whidden. On the same 9th of June, Whidden conveyed the Greenland lands to Adams, who immediately mortgaged them to Parrott.

On the 2d of June, 1821, Parrott conveyed to Adams lands in Lancaster of the value of $2,200.

On the 9th of June, 1821, Whidden conveyed to Adams lands in Greenland to the value of $4,000.

On the 9th of June, 1821, Adams conveyed to Whidden lands in Lancaster and other places, of the value of $5,000.

On the 9th of June, 1821, Adams mortgaged the Greenland land to Parrott, to secure the sum of $2,200.

When Adams bought the Greenland lands of Whidden, he immediately mortgaged them to Parrott, to secure the payment of the price of the Lancaster lands.

This is the instantaneous seisin alleged to exist by the defendant.

The rule is, that of a seisin for an instant, the wife shall not be endowed. Co. Lit. 31 b. That is where the new estate was merely *in transitu*, and never rested in the husband. *Amcotts* v. *Catherich*, Cro. Jac. 615. The seisin for an instant is where the husband by the same act, or by the same conveyance by which he acquires the seisin, parts with it. Thus if a tenant for life make a feoffment in fee his wife shall not be endowed, for by making the same feoffment which passed the fee, he acquired a fee. And if a joint-tenant make a feoffment, his wife shall not be endowed, for by the feoffment he was seised of a several estate but for an instant, which he acquired and parted with by the feoffment. Therefore, where A. conveyed to B., who by deed of the same date mortgaged back to A., it was held that B.'s wife was not dowable. *Holbrook* v. *Finney*, 4 Mass. Rep. 566. The execution of the two deeds was held to constitute but one act.

In the case of *Clark* v. *Munroe*, 14 Mass. Rep. 351, the mortgage was to a third person, and was made in pursuance of a previous agreement. It was held that the deeds still constituted but one transaction, and that the wife of the mortgagor was not dowable.

In 4 Kent's Com. 39, it is said that the wife is not dowable "where the husband takes a conveyance in fee, and at the same time mortgages the land back to the grantor, or to a third person, to secure the purchase-money, in whole or in part. Dower cannot be claimed as against rights under that mortgage."

In the present case, the mortgage was not made to secure the purchase-money of the Greenland lands, but of the lands in Lancaster. Still the two deeds would seem to constitute but one transaction, and the estate passes out of him at the same instant he receives it. *Stow* v. *Tift*, 15 Johns. 458. The husband is not beneficially seised so as to entitle his wife to dower against the mortgagee, and Kent says this conclusion is agreeable to the manifest justice of the case. There certainly is as much justice in holding that she is not so entitled against the mortgagee, though the mortgage were not given to secure the pur-

chase-money of that particular estate. If there be only an instantaneous seisin where the mortgage is given to secure the purchase-money of the mortgaged land, the seisin is equally instantaneous here, for it can make no difference what particular debt the mortgagor secures.

We think, then, that the plaintiff is entitled to dower on contributing her due proportion of the mortgaged debt. *Bullard* v. *Bowers*, 10 N. H. Rep. 500.

When Adams conveyed the land to the defendant, in 1841, he excepted from the operation of the deed the mortgage to Parrott of June 9th, 1821, and the title of the defendant from Parrott is not by paying the debt to Parrott, and thus discharging the mortgage, but simply by taking an assignment of it. It is true, he holds all the title that Adams had, and all the title that Parrott had, and the two titles, therefore, unite in him. Now by this, *prima facie*, the mortgage debt is extinguished. *Greenough* v. *Rolfe*, 4 N. H. Rep. 357. But that is not to be considered as done without regarding the equities of the parties. The debt, even if discharged so that an action could not be sustained against the original promisor, still subsists in the nature of a charge or lien upon the land, and upholds the mortgage title as against any one who ought not in justice to take the land from the mortgagee without paying the money. *Robinson* v. *Leavitt*, 7 N. H. Rep. 98. So, in the same case, it was held that one who pays the debt as assignee may consider the debt as a lien upon the land, so far as justice may require, as if the debt had actually been assigned. It is also said that where money due on a mortgage is paid, it shall operate as a discharge or as an assignment, substituting him who pays in the place of the mortgagee, as may best serve the purposes of justice, and reference is made to *Starr* v. *Ellis*, 6 Johns. Ch. 695.

But the case leaves no doubt on this point, for it is stated that the defendant took an assignment of the debt, and the case speaks of it in no other way.

She, then, may maintain a writ of dower, but it can be only on contributing her proportion of the sum paid on the mortgage, in proportion to her interest. *Rossiter* v. *Cossit*, 15 N. H. Rep. 43, and cases there cited by the court.[1]

Marston, for the defendant.
Wells and *Bacon*, for the plaintiff.

[1] The rest of the opinion is omitted.

DURANDO *v.* DURANDO.

COURT OF APPEALS OF NEW YORK. 1861.

[*Reported* 23 N. Y. 331.]

APPEAL from the Supreme Court. Paul Durando died in 1847, leaving a widow, to whom he devised his real estate for life; remainder to his children, of whom Peter Durando, the husband of the appellant, was one. In 1855, during the lifetime of Paul Durando's widow, a portion of the real estate was appropriated for the extension of the Bowery in the city of New York, and its value was, by order of the court, deposited in the hands of the chamberlain, the interest to be paid to the widow Durando during her life, and then to be subject to the further order of the court. Peter Durando died in 1853, leaving the appellant his widow. In April, 1860, immediately after the death of Paul Durando's widow, the appellant applied to the court by petition claiming her husband's share in the money, as his personal estate. The case was sent to a referee to take proofs, &c., who reported that the petitioner was entitled to the money as personal estate of her deceased husband. Upon an appeal, the petitioner claimed, that if the fund was to be regarded as real estate, she was entitled to dower therein. The court, at general term in the first district, held that the petitioner had no rights in the fund as personal estate, nor any right of dower in the land out of which the fund arose. The petitioner appealed to this court, where the cause was submitted on printed arguments.

I. M. Buckingham, for the appellant.

David Thurston, for the respondents.

SELDEN, J. To entitle a widow to dower, the husband must have been seised, either in fact or in law, of an estate of inheritance in the land at some time during the coverture. This rule is inflexible. When, therefore, the husband had, previous to his death, simply a reversion in fee, or a vested remainder expectant upon an estate for life, his widow cannot be endowed. As in such a case the husband has never had either possession or any present right of possession, he cannot be said to have had a seisin of any sort, either actual or legal. It is conceded by the counsel for the appellant, that this rule applies where lands descend to the husband, subject to the right of dower of the widow of the ancestor; as if a father die intestate leaving a widow and a son, and the widow is endowed, it is not claimed that the widow of the son, in case of his death, in the lifetime of his father's widow, could ever be endowed of the lands which had been assigned for the dower of the latter. But it is insisted, that where the estate comes to the husband, not by inheritance but by purchase, the widow may be

endowed, notwithstanding her husband has had only a remainder in the land.

The distinction, or rather the idea that it applies to this case, is evidently founded upon a misapprehension. It is true, that where a father conveys lands to a son, subject to the contingent right of the wife of the father to dower, if the father dies, and his widow is endowed, and before her death the son dies leaving a widow, the latter, if she survive the widow of the father, is entitled to dower in the lands of which such widow had previously been endowed. But the reason is, not because there is any distinction between a vested remainder, which comes by descent, and one created by deed, but because in the case supposed, the son becomes actually seised of the estate in the lifetime of the father; and this seisin is sufficient to entitle his widow to dower, although his estate is contingent, and is defeated by the death of the father leaving a widow.

I can discover no other foundation for the position assumed by the appellant's counsel, than the inapt use by Coke of a single word in a passage which I will quote. In speaking on this subject he says: "For example, if there be grandfather, father and son, and the grandfather is seised of three acres of land in fee, and taketh wife and dieth, this land descendeth to the father who dieth either before or after entry, now is the wife of the father dowable. The father dieth, and the wife of the grandfather is endowed of one acre and dieth, the wife of the father shall be endowed only of the two acres residue, for the dower of the grandmother is paramount the title of the wife of the father, and the seisin of the father which descended to him (be it in law or actual) is defeated; and now upon the matter the father had but a reversion, expectant upon a freehold, and, in that case, *dos de dote peti non debet;* although the wife of the grandfather dieth living the father's wife. *And here note a diversity between a descent and a purchase.* For in the case aforesaid, if the grandfather had *enfeoffed* the father, or made a gift in tail unto him, there in the case above said, the wife of the father, after the decease of the grandfather's wife, should have been endowed, of that part assigned to the grandmother; and the reason of this diversity is, for that the seisin, that descended after the decease of the grandfather to the father, is avoided by the endowment of the grandmother, whose title was consummate by the death of the grandfather; but in the case of the *purchase* or gift, *that took effect in the life* of the grandfather (before the title of dower of the grandmother was consummate), is not defeated, but only *quoad* the grandmother, and in that case there shall be *dos de dote*" (Coke, Lit. 31 a, b).

The word purchase, which occurs in this paragraph, when used in contradistinction to descent, includes the obtaining of title by devise as well as by deed. But the whole reasoning of the passage quoted, shows that the effect attributed to a purchase follows only when the land is conveyed by deed. The sole reason given for the distinction is, that a purchase takes effect in the lifetime of the vendor, and the pur-

chaser becomes at once seised of a defeasible estate; while in case of a descent, the heir is never seised of the lands assigned for dower during the life of the widow, as her title relates back in all cases to the death of the husband. Now, in this respect, there is not the slightest difference between a descent subject to dower, and a devise subject either to dower or any other life estate. In either case the freehold passes directly to the tenant of the life estate, upon the death of the ancestor or devisor, and neither the heir nor the devisee of the remainder can have any seisin until the death of such tenant.

The distinction is stated in terms perfectly accurate and precise by the chancellor in the case of *Dunham* v. *Osborn*, 1 Paige, 634; but in the subsequent case of *Cregier* (1 Barb. Ch. 598), he uses the word purchase as it is used by Lord Coke, and states the distinction as being between estates which came to the husband by descent, and those which came by purchase, subject to dower. This inaccuracy in the use of the word purchase, by both Lord Coke and Chancellor Walworth, is perfectly palpable; but as it has led to the bringing of so clear a case as the present to this court, it may be well to advert to and explain it. That it is this which has misled the counsel for the appellant is obvious, as he commences his citations in support of his doctrine with the Year Book (5 Edw. III., title, Voucher, 249), which appears to be the very authority upon which Lord Coke based his distinction. None of the other authorities cited by the counsel have any tendency to support his position; and it is very clear that it is untenable. The precise question was decided by the Supreme Court of Massachusetts in the case of *Eldridge* v. *Forrestal*, 7 Mass. 253, and in *Beekman* v. *Hudson*, 20 Wend. 53, it was assumed as perfectly clear, that in such a case the widow was not entitled to dower.

There can be no pretence that the widow is entitled to the fund in question as personal estate, under the Statute of Distributions. The money is the product of the land taken, and must belong to the persons entitled to the land which it represents, and out of which it arose. Besides, the title had already vested in the heirs when the proceedings for extending the street were commenced; and if the widow had then no right of dower in the premises, she of course can have no right to the money even if it is to be considered as personal estate.

The judgment of the Supreme Court must be affirmed.

All the judges concurring,

Judgment affirmed.

SECTION III.

DOWER BY ESTOPPEL.

GAUNT *v.* WAINMAN.

COMMON PLEAS. 1836.

[*Reported* 3 *Bing. N. C.* 69.]

To a writ of dower the tenant pleaded that the husband of demandant was not at the time of her marriage with him seised of such estate in the messuages and lands, &c. in question, whereof he could endow the demandant.

At the trial it appeared that in October, 1824, the assignees of the demandant's husband, then a bankrupt, conveyed the premises in question to the defendant under the description of "All that messuage, and all such plot or part as is of the nature or tenure of *freehold*, of and in a close called Near Bank."

The tenant proved that the premises were leasehold: but it being objected that he was estopped to offer this proof against the deed under which he had taken the premises, the verdict was entered for the demandant, with leave for the tenant to move to set it aside.

A rule *nisi* having been obtained accordingly,

Creswell and *Hoggins*, who showed cause, referred to Sheph. Touchst. 53, and the authorities cited in the judgment of the court in *Lainson* v. *Tremere*, 1 Adol. & Ell. 792, to show that the tenant was estopped by the deed under which he claimed title to dispute the nature of the title conferred by that deed. [TINDAL, C. J. As between the parties to that deed there may be an estoppel; but you set it up against a stranger to the deed.] The defendant buying the property subject to dower, bought it, in effect, of the wife as well as of the husband; he is therefore estopped to turn round against the party of whom he purchased. [TINDAL, C. J. Suppose he had bought the premises as a leasehold; would the demandant be estopped to say that they were freehold?] It may be conceded she would not.

Wightman, for the tenant. That disposes of the case, for there can be no estoppel unless it be mutual. But this was no estoppel even as between the parties to the deed; for if it were, a party who should buy a leasehold under the representation that it was freehold, could never bring an action on the covenant for title. He would be under the double disadvantage of not having the estate he bargained for, and of being subject to dower upon a leasehold estate.

TINDAL, C. J. I think this is a case in which the defendant is not precluded from showing the real nature of the estate. According to

Co. Lit. 352 a, "Every estoppel ought to be reciprocal, that is, to bind both parties; and this is the reason, that regularly a stranger shall neither take advantage, nor be bound by the estoppel."

It would be hard indeed if it were otherwise; and therefore this rule must be made

Absolute.[1]

BOWNE *v.* POTTER.

Supreme Court of New York. 1837.

[*Reported* 17 *Wend.* 164.]

This was an action of ejectment for dower, tried at the Tioga Circuit in December, 1834, before the *Hon. Robert Monell*, one of the circuit judges.

The plaintiff proved her marriage with Robert L. Bowne in the year 1803, and the death of her husband in 1821, and produced in evidence the exemplification of a warranty deed from her husband to one Daniel Fairchild, bearing date 28th April, 1812, conveying two lots of land, an undivided third of which was demanded in this action. She also produced an exemplification of a deed from Fairchild to the defendant, bearing date 18th September, 1820, conveying the same lots, and proved that in June, 1812, Fairchild was in possession under the deed to him, and continued in such possession until he was succeeded by the defendant under his deed from Fairchild. The defendant offered to prove that at the time of the conveyance to Fairchild, Bowne was not in the actual possession, had not title to, and was not seised of the lots conveyed by him; that when Fairchild entered into possession the lots were wild and uncultivated, and never had been in the actual possession of Bowne; and further, that after the defendant came into the possession of the lots, a suit for their recovery was instituted against him by the heirs of the original patentee, who held the paramount and true title to the lots, and that he, the defendant, purchased the lots and took a conveyance from such heirs: which evidence was objected to by the plaintiff and rejected by the judge. The jury thereupon, under the charge of the judge, found a verdict for the plaintiff. The defendant moves for a new trial.

J. A. Collier, for the defendant.

J. A. Spencer, for the plaintiff.

By the Court, Nelson, C. J. The only question presented in this case is, whether the plaintiff gave such proof of the seisin of her husband during coverture in the premises, as will entitle her to dower in the same, and as prevents the defendant from disputing the fact. The defendant offered to show that the husband never had title to the premises, but did not offer to show an eviction.

[1] *See Foster v. Durand*, 49 Me. 44 (1861).

The ground assumed by the counsel for the plaintiff is, that the acceptance of a deed from the husband and possession of the premises under it, is an admission of the seisin by the grantee and all coming in under him, and that they are estopped from contradicting it, and several cases in this court were cited to sustain this position. 1 Caines, 185; 6 Johns. R. 293; 7 Id. 281; 9 Id. 344; 15 Id. 21; 2 Id. 124; 5 Cowen, 301; 12 Wendell, 65. The counsel for the defendant endeavored to distinguish this case from those heretofore decided, upon the ground that no actual possession of the premises had been taken by the husband, or existed, before the deed to Fairchild, from which seisin could be implied, or if the taking of the deed and entry into possession was *prima facie* evidence of seisin as against Fairchild, and those claiming under him, it was not conclusive, and might be rebutted.

In all the cases referred to it does appear that the husband had been in the actual possession and occupation of the land, but that fact does not seem to have been specially relied upon, and in some of them is not noticed as a controlling circumstance. In *Hitchcock* v. *Harrington*, 6 Johns. R. 290, Kent, C. J., says, the objection of want of seisin in the husband cannot be received from the defendants, as they hold under the husband by virtue of conveyances from his son and heir-at-law. Again, in *Collins* v. *Torry*, 7 Johns. R. 278, the court say the tenant derives his title from and holds under the title of the husband of the demandant, as it existed during coverture, and he therefore is not permitted to deny the seisin of the husband. And again, in *Hitchcock* v. *Carpenter*, 9 Id. 344, as the defendant claims under the heirs of Ferris, he is estopped from denying the seisin and death of Ferris, the former husband of the demandant. He has affirmed that seisin by taking under the heirs; and that it was so considered by the court in the case of *Hitchcock* v. *Harrington*. *Taylor's Case*, cited from Sir W. Jones, 317, was there referred to, where it was held that if a tenant at will or for years made a feoffment in fee and died, and his wife brought dower against the feoffee, he could not plead that the husband was not seised. This case is mentioned as good law in all the respectable treatises on dower. 1 Cruise, 148, § 19; 2 Bac. Abr. 333, 371, *n.*; 1 Co. Lit. 665, *n. g.*; Park on Dower, 44. In a note of Mr. Gwillim, in Bacon, he remarks, that where a husband tortiously gains an instantaneous seisin, as against the person benefited by and deriving an estate in virtue of such tortious act, the wife is entitled to her dower, and he refers to *Taylor's Case*, and the reason given is that since the feoffee received his estate from the feoffor, he is estopped to say the husband was never seised; and besides, in respect of the feoffee, the feoffor had an estate, though in regard to the disseisee he is a wrong-doer. See also 2 Bac. Abr. 333, tit. Disseisin. It is laid down in some of the books that this rule is not applicable to the feoffment of a tenant for life, but Mr. Park is inclined to think otherwise, p. 44; Fitz. Nat. Br. 352; Moy. 150, *n.* It had before been remarked by this

author, in his very valuable treatise, p. 37, that a mere naked seisin without right, or defeasible by title paramount, as that of a disseisor, abater, intruder, discontinuer, or other person having the freehold and inheritance by wrong, is such a seisin as dower will attach upon, as against all persons deriving title under such tortious or defeasible seisin, and until it shall be avoided by the entry or action of the person having right, or by operation of law called remitter. *Banden* v. *Baugh*, Cro. Car. 304, 305. And it is well settled at common law that the heir or alienee of a disseisor cannot be entered upon or ousted by the disseisee, except by the orderly course of law. 3 Black. Com. 177, 178, 179, 180. The defeasible title, in such a case, therefore, could only be determined by a judgment and execution under the paramount title.

It is true, that a conveyance by feoffment operated upon the possession without any regard to the interest or estate of the feoffor, so that to make it valid, nothing was wanting but actual possession, and therefore such a conveyance by a tenant for life or years with livery of seisin passed an estate in fee, and operated as a disseisin of the real owner. In this respect, it differs from our modern instruments of conveyance. But this difference exists more in name, than in substance. The real owner had still a remedy by which he could become re-seised. Under our modern deeds of conveyance, the grantee in fee, taking possession, may defend successfully his title and possession against all the world except the true owner. This position he acquires by means of his conveyance and possession, and until evicted by the paramount title, there seems to be no good reason for extending to him the favor of disputing the title under which he enters and holds. While undisturbed he is enjoying the estate granted, and it is to be presumed that he has provided by proper covenants against any future failure of title and eviction.

It seems to me also to be an immaterial circumstance in the case, that the grantor had not actual possession before or at the time of the conveyance to Fairchild. It did not affect prejudicially the legal operation of the deed or possession under it by the grantee. The title he acquired would have been no better if the grantor had been in the actual possession. The reason for the estoppel is the same.

It must be conceded that if the husband had entered into a contract of sale, or given a lease for life or years, instead of this deed, the defendant would not be permitted to deny his title by way of defence to the claim of dower, or set up title in a third person. While occupying under his vendor or lessor, he is not at liberty to purchase in even a better title, and thus dispute the title by which he acquired the possession. 14 Johns. R. 22; 7 Cowen, 637; 5 Wendell, 247. He would not be permitted to dispute the title of the heir of the lessor in an action to recover the remainder on the expiration of the lease: and I do not perceive how the claim of the widow can be distinguished from that of the heir. She holds under the title of the husband, like the heir, and her interest is one which has never been sold or parted with,

and in this respect is like the estate or remainder recoverable by the heir. It has been decided in *Jackson* v. *Wattermire*, 5 Cowen, 299, that the same evidence of seisin which would entitle the heir to recover in ejectment will sustain an action for dower.

The soundness of this view is also confirmed by the consideration, that the right of dower attaches if the estate be such that the issue or heir might by possibility inherit it. Now, in this case, if less than the whole estate had been conveyed to Fairchild by the husband, after the expiration of the estate granted, the defendant would have been bound to give up possession to the heir without disputing the title; and why should he not assign to the widow her dower which he has never acquired? Her rights are as strong as those of the heir, and the hardship no greater in the one case than the other.

New trial denied.

SPARROW *v.* KINGMAN.

COURT OF APPEALS OF NEW YORK. 1848.

[*Reported* 1 *Comst.* 242.]

ERROR from the Supreme Court. Elizabeth Kingman brought ejectment in the Common Pleas of Erie County, against Erastus Sparrow to recover an undivided sixth part of certain premises as the widow of George G. Kingman, deceased. After issue joined, the cause was removed by *certiorari* into the Supreme Court, and was tried at the Erie Circuit, before *Dayton*, Circuit Judge, in January, 1846. On the trial, the marriage of the plaintiff and the death of her husband, were admitted.

The plaintiff proved that her husband, George G. Kingman, and Philo Durfee, were in possession of the premises from 1837 to 1840 inclusive, claiming as owners, and built certain mills thereon called the "Erie Mills;" that in February, 1841, Kingman gave a quitclaim deed of his interest in the premises to S. J. Holley, and that in August, 1841, Durfee also gave a quitclaim deed of his interest in the premises (declared in the deed to be an undivided half) to the defendant. That in April, 1842, the defendant and Holley united in a quitclaim deed of the premises to Ira B. Carey, and that the defendant, at the commencement of the suit, was in possession under a lease from Carey. The defendant offered to show that Kingman never had any estate in the premises of which his wife was dowable, but that his estate was a leasehold estate merely; also that he never had any title whatever to the premises. The evidence so offered was objected to by the plaintiff, and excluded by the Circuit Judge on the ground, that as Kingman, when in possession, had, by his deed to Holley, assumed to convey a fee, and as the defendant held under that deed, he, the defendant, was bound by it, and was estopped from setting up that Kingman had not an estate of which his wife was

dowable. The defendant excepted. A verdict was had for the plaintiff, and the defendant, upon bill of exceptions, moved in the Supreme Court for a new trial, which motion was denied, and judgment rendered for the plaintiff. The defendant brings error.

H. S. Dodge, for plaintiff in error.

N. Hill, Jr., for defendant in error.

WRIGHT, J. On the trial at the Circuit, the marriage of the plaintiff below with George G. Kingman, and the death of the latter, were admitted; and when the plaintiff rested her cause she had *prima facie* established a seisin in fee of her husband, in his lifetime, in the lands from which dower was demanded. For this purpose it was sufficient to show his actual possession of the premises, claiming as owner. This is presumptive evidence of seisin, and sufficient until the contrary appears. 2 Phillips Evidence, 282; 2 John. R. 123; 5 Cowen, 301. But she went further, showing a quitclaim or release of the premises from her husband to S. J. Holley, and from Holley and others by successive releases to the landlord of the defendant. To rebut the presumption of seisin, arising from this evidence, the defendant offered to show affirmatively that Kingman never had any title to the premises, or that, at most, he had but a leasehold estate, of which his wife was not dowable. The Circuit Judge rejected this evidence, and decided that as Kingman, when in possession, had, by his deed to Holley, *assumed to convey a fee*, and as the defendant held under that deed he was bound by it, and was estopped from setting up that Kingman had not an estate of which his wife was dowable, and that upon the evidence given, the plaintiff was entitled to a verdict.

I am of opinion that it will be difficult to rest this decision upon sound principle, or to reconcile it with the doctrine of estoppels, as generally understood and expounded by the courts; although I am aware that there are several cases in our own courts, that hold that a grantee of the husband is estopped from denying his seisin in an action of dower brought by the widow. 6 John. R. 393; 7 J. R. 279; 12 Wend. R. 47; 17 Wend. 164. See 2 Hill, 207; 3 Hill, 518. Perhaps the case of *Bourne* v. *Potter*, 17 Wend. 164, is the only one that may be said to entirely assimilate with the present. The error originated in a *dictum* of a judge of the Supreme Court, in an early case, and has been followed until the present time; recently, not because the misapplication of the law of estoppels was not distinctly seen by the learned judges who sat in the Supreme Court, but for the reason that the rule had been conclusively settled for them by repeated adjudications of their predecessors. Here, however, the question is not *res adjudicata*, and we shall be at liberty to reject the rule, if it shall be found, on examination, irreconcilable with the doctrine of estoppels *in pais*, and unsupported by principle or binding authority.

If the grantee in fee is estopped from denying the seisin of his grantor, a uniform and invariable application should be given to the rules. Indeed, the reason is not so strong for applying it in dower

cases (in which only it has been fully applied) as in cases arising immediately between grantor and grantee or those claiming under conveyances from the grantor. If the grantee, therefore, is invariably estopped, the grantor, also, is concluded; for it is a principle of the law of estoppels that they must be mutual. But I am not aware that it has been latterly doubted, that a grantor who conveys or releases, without interest in the lands conveyed or released, may not show that he had no title to pass by his conveyance; unless, in the conveyance itself, by way of recital or otherwise, he represents himself to be the owner of the premises, or having some particular interest therein, which it would be fraudulent to permit him to gainsay or deny. The recital, in a conveyance with certainty of a particular fact forming an inducement for the contract, will bind the grantor, but otherwise there is no estoppel. General words will not have this effect. When a grantor conveys, without title, but with covenant of warranty, he will be concluded, and an after acquired estate will pass to the grantee, not because the party conveying had a title at the execution of his deed, or that the law will presume such an absurdity, but by way of avoiding circuity of action. An equitable estoppel will be interposed. The grantor has solemnly covenanted that he had title at the date of his conveyance, and has agreed to warrant and defend it; the law will not permit the grantee to be evicted, and put to his action against the grantor on the covenant; or in other words, it will, in an action by the latter to recover the possession of the premises, estop him "from impeaching a title to the soundness of which he must answer on his warranty." But the grantor is not concluded unless an action may be brought against him. A quitclaim deed only purports to release and quitclaim whatever interest the grantor may then have in the premises. If he have none *in esse* at its delivery, nothing passes; and not having covenanted to be answerable for the soundness of the title conveyed, should the grantor afterwards acquire a valid estate in the premises, he could not be chargeable with bad faith in attempting to enforce it. In such a case he could not be met by any direct admission on his part inconsistent with the title or claim he purposed to set up, and upon which the other party could have an action, and which would create an injury to such party by allowing it to be disproved. Kingman, the grantor in the present case, therefore, would not have been estopped by his quitclaim deed to Holley from showing either that no title passed by it, or that the estate conveyed was less than a fee. 1 Cowen, 616; 4 Wend. 622; 13 Wend. 178; 3 Hill, 219. The Circuit Judge grounded his decision upon the fact "that Kingman, when in possession, had by his deed to Holley, *assumed to convey a fee.*" This, it seems to me, was an unwarrantable construction of the deed. It was an ordinary quitclaim, that might be, and often is, used to pass an estate less than a fee. Kingman, by giving it, could assume nothing in relation to the extent or nature of the estate. The law fixes the force and effect to be given to the instrument. It could pass no greater

estate or interest than the grantor himself possessed at the delivery of it. Had Kingman been a tenant for life or years, or seised in fee, all his title, estate or interest would have passed to the grantee by the conveyance which he executed, and nothing more. 1 R. S. 739, §§ 142, 143, 145. The deed, therefore, from Kingman to Holley, *assumed* to pass whatever estate and interest Kingman had without specifically defining it.

If the grantor, then, might show that no title passed by his quitclaim, and recover the land in opposition to it, why should the mouth of his grantee be closed from denying that he received an estate in fee from him, or that, indeed, any title passed by his conveyance? Apply the rule of mutuality, and it is impossible to assign a valid reason. Both parties must be bound, or intended to be, else neither is concluded. There can be no soundness in the principle of estopping a grantee from showing that no interest passed to him by the deed of the grantor, while the latter is permitted to show it. But it may be further observed, that this was an action for dower brought by Kingman's widow, and had Kingman conveyed the premises to Holley, with covenant of warranty, and thereby, by the doctrine of equitable estoppel, concluded himself from denying that a title passed by his deed, the widow could not have been affected. His covenant could not have estopped her. She would have been neither a party nor privy, but a stranger to the conveyance, claiming by paramount title. She would not be concluded if the grantor was, and by the rule of mutuality, as against a stranger, the grantee should not be. In the case of *Gaunt* v. *Wainman*, 3 Bing. N. C. 69, the tenant was permitted to show the land to be leasehold, although it was set forth as freehold in the deed to himself which was produced at the trial. Tindal, C. J., said, that "if an estoppel existed it must of necessity be mutual; but that it could not be contended that if a husband conveyed freehold as leasehold, his widow would be concluded from showing the real nature of the estate;" and he therefore held that the same right existed in the tenant. In the case under consideration the defendant below proposed to show that Kingman had but a leasehold estate, even admitting that by his quitclaim he assumed to convey a fee; and in this respect, the case of *Gaunt* v. *Wainman* is in direct conflict with the ruling of the Circuit Judge. It has, also, been held that if baron and feme join in a lease for years, by indenture, rendering rent, where the baron hath all the estate and the wife nothing; after the death of the baron the lessee, in action of debt brought by the feme, shall not be concluded to say that at the time of the lease made the feme had nothing in the lands, because the feme being covert was not estopped, and, by consequence, neither shall the lessee, for the reason that all estoppels ought to be mutual. Bacon's Abridg. Title Leases (O) and cases cited. To hold, therefore, that the grantee is estopped, when sued by the widow, from showing that his grantor had no estate in premises, or a less estate than his deed purported to convey, whilst the widow, not being

a party or privy to the conveyance, is not barred, is a violation of Lord Coke's first rule, viz.: that "estoppels ought to be reciprocal."

It is contended that the grantee is concluded by acceptance of the deed. But, waiving the doctrine of mutuality, this cannot be, unless there be an estate which has actually passed to the grantee by it, co-extensive with its description in the conveyance. The mere acceptance of a deed-poll, when no interest actually passes by it, surely cannot conclude the party accepting. Such a conclusion would be totally irreconcilable with every principle of the law of estoppel *in pais*. Lord Coke, in treating of estoppels *in pais*, includes that "by acceptance of an estate," but he distinctly illustrates his meaning by an example which he gives of a case put by Littleton, viz.: of a common law assurance by feoffment without writing accompanying it. Such an assurance operated on the possession, and if correctly pursued always passed a freehold or fee simple to the feoffee. But in the case of a conveyance by grant, bargain and sale or release, in which it is never necessary that actual possession should accompany the deed, the very point is whether an estate existed in the grantor, and has passed to be accepted. In *Taylor's Case*, 34 Eliz. (cited in Sir W. Jones, 317), which has been relied on to sustain the doctrine that a grantee is estopped in dower cases to deny the seisin of the husband, it was held that if a tenant at will or for years make a feoffment in fee and died, and his wife brought dower against the feoffee, he could not plead that the husband was not seised. This is the case of a tortious feoffment, in which the feoffee has obtained and retains the actual seisin of the lands by a wrong, in which he is in some degree a willing participant. It is to be remembered that to make a valid feoffment, nothing was wanting but possession, and when the feoffor had possession, though a mere naked one, a freehold or fee simple passed to the feoffee by reason of the livery. This livery of seisin was the investiture or delivery of corporal possession of the land to the feoffee, and was absolutely necessary to complete the gift. It was a corporal transfer of the soil from one man to another taking effect *in presenti* or not at all. The feoffee was a principal actor in the transfer, and passed at once into the full enjoyment of the fee. Lit. §§ 595, 599, 611, 698; Co. Lit. 366, 367 a; 2 Black. Com. 310, 313. The feoffment, which could not be made without an acceptance of the possession by the feoffee, whether tortious or not, operated as a disseisin of the owner, and although he had a right of entry by action in the case of a tortious disseisin, that right might be tolled by a descent cast. Consequently it will be seen that the acceptance of an estate passed by feoffment and livery of seisin differs widely from the acceptance of a modern conveyance by grant in which it is never necessary, to give it validity, to enter and take corporal possession of the land, and by which the grantee may obtain a fee, or a less estate, or no estate at all. The former was one of those solemn notorious acts *in pais* to which the common law attaches peculiar and extraordinary efficacy and importance; as much

so as to matters shown by record or writing under seal. Hence, Lord Coke in enumerating estoppels *in pais* includes such an acceptance. But who ever heard, at common law, that where an interest in lands was attempted to be conveyed by deed-poll, without livery, that the grantee who accepted the deed was estopped from controverting the seisin of the grantor, or in other words from showing that nothing, or a less estate than a fee, passed by such deed? Even in the case of a lessee by deed-poll it was formerly held that he might dispute his lessor's title. Co. Lit. 47 b; Lit. § 58; 1 Ld. Raymond, 746. A conveyance by feoffment, with livery of seisin, has long fallen into disuse even in England, and, at least with us, a grant without the ceremony of livery is made competent to convey and pass all the estate and interest which the grantor can lawfully convey. Indeed, a grant never passed anything more. Lit. § 608. The grant not operating directly upon the possession as in the case of a feoffment, but simply on the estate and interest which the grantor had in the premises granted, if nothing actually passes, it is obvious there can be no acceptance of an estate; or if the grantor have a less estate than he conveys, only the estate which he has passes, and the acceptance must necessarily be of the estate passed. So that in the conveyance of lands by deed, the question whether there has been an acceptance of an estate by the grantee, and the extent of it, depends on the solution of the prior question whether the grantor had any estate to convey, and if he had, what is its real nature. A point which must be determined by proof *aliunde*. In the present case the opportunity was denied to the defendant below of solving the question whether Kingman had any estate or interest to pass by his deed; and if he had, the nature and extent of it; and the judge assumed that the mere acceptance of the instrument, whether it passed anything or not, was sufficient to estop the defendant from controverting Kingman's seisin.

It was intimated in the case of *Springstein* v. *Schermerhorn*, 12 John. R. 363, that Co. Lit. 47 b was an authority to show that a grantee generally, under any form of conveyance, was concluded from denying the title of his grantor. But the doctrine is far from being sustained by the authority. It is this, "that if a man takes a lease for years *by indenture* of his own lands, whereof he himself is in actual seisin and possession, this estops him during the time to say that the lessor had nothing in the lands at the time of the lease made, but that he himself, or such other person was then in actual seisin or possession thereof; *for by acceptance thereof by indenture* he is, for the time, as perfect a lessee for years, as if the lessor had at the time of the making thereof an absolute fee and inheritance in him." The remarks of the learned text writer are limited to a *lease indented* in which the grantee is estopped, by his own contract under seal, and not by an act *in pais*. The extent of the authority is that the lessee is concluded by his own deed, for it is immediately said, "but if such lease for years were made by deed-poll of lands wherein the lessor had nothing, this would

not estop the lessee to aver that the lessor had nothing in those lands at the time of the lease made; because the deed-poll is only the deed of the lessor, whereas the indenture is the deed of both parties, and both are as it were put in and shut up by the indenture, that is where both seal and execute it, as they may and ought." Co. Lit. 47 b; Bacon's Abrg. "Leases" (O). It is not law now, that a lessee even by deed-poll, who retains possession under his lease, may dispute the title of his lessor, but it was in the time of Lord Coke, and hence the illustration is pertinent and conclusive in limiting and defining the extent of the authority cited. Again, it has been repeatedly held that it may be shown that a less estate passed than the estate mentioned in the deed, although it be an indenture; which could not be, if the rule was universal that a grantee is concluded by an acceptance of the conveyance. 2 Wms. Saunders, 418, note *a*; 2 Smith's Leading Cases, 457; 4 Kent's Com. 98. No proposition can be more undoubted, than that the grantee in a deed-poll is never estopped by the terms of the grant, for it is not his deed, not having sealed and executed it; and it seems a sheer absurdity to say that he is concluded by acceptance of a conveyance, by which no estate actually passed to him, for the reason that the grantor had none to convey. Such a doctrine is entirely irreconcilable with the system of modern conveyancing and transfer of lands, and if carried out would lead to innumerable and perplexing difficulties. Actions on covenants of seisin, or warranty, or for quiet enjoyment are of daily occurrence, but how would it be possible ever to maintain them, if a grantee by an acceptance of the deed of his grantor is barred from showing a paramount title, or a defect in the estate of the latter? If this rule prevailed, these covenants in our modern conveyances might be inserted as ornaments, but would be of little practical utility.

Chief Justice Nelson, in the case of the *Welland Canal Company* v. *Hathaway*, 8 Wend. 483, defined the doctrine of an estoppel *in pais* as follows: "As a general rule, a party will be concluded from denying his own acts or admissions which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter." He adds that the party will be concluded "when in good conscience and honest dealing he ought not to be permitted to gainsay" his acts or admissions. Bronson, J., in *Dezell* v. *Odell*, 3 Hill, 225, adopts this definition with approbation, and adds, "A party is only concluded against showing the truth, or asserting his legal right, when that would have the effect of doing a wrong through his means to some third person." Under such circumstances, Justice Cowen remarks, in the latter case, "for the prevention of fraud, the law holds the act or admission to be conclusive." It must, however, have been acted upon by the other party. The party who accepts the deed in fee of a grantor having no title or a less estate than he conveys, performs no act expressly designed to influence and influencing the conduct of the latter to his injury; nor

does he make any admission which, "in good conscience and honest dealing, he ought not to be permitted to gainsay." The fraud, if any there be, is on the part of the grantor, and the injury will fall solely upon the grantee, unless he be permitted to show the truth. There is no relation existing between the grantee in fee and his grantor, as will raise even an implied obligation on the part of the former against a denial of the title and estate of the latter. In *Osterhout* v. *Shoemaker*, 3 Hill, 518, the court undoubtedly lays down the true rule. Bronson, J., in delivering the opinion of the court, says: "Although a tenant cannot question the right of his landlord, a grantee in fee may hold adversely to the grantor, and there can be no good reason why he should not be at liberty to deny that the grantor had any title. There is no estoppel where the occupant is not under an obligation, express or implied, that he will at some time or in some event, surrender the possession. The grantee in fee is under no such obligation. He does not receive the possession under any contract, express or implied, that he will ever give it up. He takes the land to hold for himself, and to dispose of it at his pleasure. He owes no faith or allegiance to the grantor, and he does him no wrong when he treats him as an utter stranger to the title." See also 15 Mass. R. 499. The reason of the rule is readily seen why a tenant in possession may not question his landlord's title, or a vendee, under an agreement to purchase, that of the vendor. He has obtained the possession which he would not otherwise have had, "under an obligation, express or implied, that he will, at some time or in some event, surrender it." The law will hold him to his obligation. But even in the case of a tenant or vendee, should he first restore the possession, there would be no obstacle in the way of controverting the landlord or vendor's title. Originally, at common law, as we have seen, the lessee by deed poll might always dispute the estate of the lessor; and he is now permitted to show that the landlord had a less interest than he demised. In *Doe* v. *Barton*, 11 Adol. and Ellis, 315, it was held that in ejectment the tenant may protect his possession against his landlord by showing that the title of the latter was defeasible under a prior mortgage, at the time the lease was made, and that he has since been compelled to pay rent to the mortgagee, and put him in constructive possession of the premises. Thus, even in the case of a lessee where there has been a constructive eviction, as in *Doe* v. *Barton*, he may show a state of facts in the protection of his possession, inconsistent with the claim or title of his lessor. Where there has been an actual eviction by title paramount, this right has never been doubted. It would, therefore, be strange indeed, if a grantee in fee, who is never under any obligation to restore the possession, and who may have been compelled to purchase in for his protection an outstanding valid title, should be concluded from showing that no title passed by the deed of his grantor, or that the estate or interest which passed was less than that mentioned in the deed.

I am of the opinion that the judgment of the Supreme Court should

be reversed, and am content to place my vote for reversal on the distinct ground, that in an action for dower the grantee in fee of the husband is not concluded from affirmatively controverting the seisin of the latter. This is the law of England and of Massachusetts, and if an opposite rule has heretofore prevailed in this State, it is not too late to correct the error. Where property has been acquired, or rights matured, and exist, under an erroneous decision of the courts, insomuch that irreparable mischief and injury must necessarily result from its overthrow, the maxim of *stare decisis* should prevail. But this is not one of those errors, from the correction of which injurious consequences may follow.

JEWETT, C. J. The question to be decided in this case is, whether it was competent for the defendant to show, that Kingman never had any estate of inheritance in the premises. The judge decided that as Kingman, when in possession had by his deed to Holley, assumed to convey in fee, and as the defendant held under that deed, he was bound by it, and was estopped from setting up that Kingman had not an estate of which his wife was dowable.

It cannot be denied, but that the decision of the judge on the trial is in conformity with the principles settled by a series of cases determined by the Supreme Court, from *Bancroft* v. *White*, 1 Caines, 185, to *Sherwood* v. *Vandenburgh*, 2 Hill, 303. In the latter case, however, the late Mr. Justice Cowen put his opinion upon the ground of the authorities, and not upon the ground that the doctrine of estoppel had been in those cases correctly applied, and distinctly suggested that the question was a very fit one for review in the court for the correction of errors. And Mr. Justice Bronson in *Osterhout* v. *Shoemaker*, 3 Hill, 513, remarked in reference to the cases which hold, that in dower the grantee of the husband is estopped to deny the grantor's title, that they were to be followed because the rule had been so settled, and not because it rested on any sound principle.

As defined in the books, "an estoppel is when a man is concluded by his own act or acceptance, to say the truth," of which there are three kinds. By matter of record, by deed, and by matter of *pais*. The estoppel which the plaintiff claims in this case arises by matter *in pais*, if at all; that species arises, by livery, by entry, by acceptance of rent, by partition, and by *acceptance of an estate*. Co. Lit. 666, 667.

The principle in respect to that, which arises by an acceptance of an estate, is, that a man shall not be permitted, during his possession of premises, to dispute the title of the landlord under whom he entered, and applies only in cases where the party accepting the estate is under some obligation, express or implied, that he will at some time or in some event, surrender the possession. "The grantee in fee is under no such obligation. He does not receive the possession under any contract express or implied that he will ever give it up. He takes the land to hold for himself, and to dispose of it at pleasure. He owes no

faith or allegiance to the grantor, and does him no wrong when he treats him as an utter stranger to the title."

The deed from Kingman to Holley was a mere quitclaim deed-poll, of one part, signed by Kingman only. Therefore, no one at common law would be bound by it but he, and it would not work an estoppel against the grantee, and I think not as against the grantor. Co. Lit. 47, 61; Shep. Touch. 1 Am. Ed. 53; *Right* v. *Bucknell*, 2 Barn. & Adol. 278. At the common law, all the parts of a *deed indented* in judgment of law made but one deed, and every part was of as great force as all the parts together, and were esteemed the mutual deeds of either party, and either party might be bound by either part of the same, and the words of the indenture were the words of either party. It was stronger than a deed-poll, for it worked an estoppel against either party to say or except anything against anything contained in it. 1 Shep. Touch. 53; Plow. 434.

The argument on the side of the plaintiff is that Kingman *assumed to convey a fee;* and that as the defendant held under that deed, he was bound by that assumption. This, I think, is founded upon a mistake of *fact* as well as of law. I have already remarked that the deed is merely a quitclaim deed-poll; and therefore, upon its face and by its terms, it only purports to convey whatever interest in the premises the grantor then had. It does not affirm that he had any. How then can the grantor be supposed conclusively to admit that he had? If the admission should be co-extensive with the grant, it would be but conditional; that is, that if the grantor had any right or interest which passed by his deed, it vested in Holley the grantee.

And now by 1 R. S. 739, § 143, it is enacted that no greater estate or interest shall be construed to pass by any grant or conveyance, thereafter executed, than the grantor himself possessed at the delivery of the deed, or could then lawfully convey, except that every grant should be conclusive as against the grantor and his heirs claiming from him by descent; and by § 145, it is declared that a conveyance made by a tenant for life or years, of a greater estate than he possessed or could lawfully convey, shall not work a forfeiture of his estate, but shall pass to the grantor all the title, estate, or interest, which such tenant could lawfully convey.

And again, by 1 R. S. 748, § 1, it is declared that every grant or devise in real estate, or any interest therein, thereafter to be executed, shall pass all the estate, or interest of the grantor or testator; unless the intent to pass a less estate or interest shall appear, by express terms, or be necessarily implied in the terms of such grant; and § 2 provides that in the construction of every instrument creating or conveying, or authorizing the creation or conveyance of, any estate or interest in lands, it shall be the duty of courts of justice to carry into effect the intent of the parties, so far as it can be collected from the whole instrument, and is consistent with the rules of law. Now, I do not think that we are authorized to say that Kingman assumed by his

deed to convey a fee; the clear intent, as well as expression of his deed, is to convey only what interest or estate he then had in the premises. But again. Co. Lit. 352 a, shows that every estoppel must be reciprocal, that is to bind both parties, and that is the reason that, regularly, a stranger shall neither take advantage of, nor be bound by, the estoppel; but privies in blood, as the heir, and privies in estate, as the feoffee, lessee, &c.; privies in law, as the lord by escheat, tenant by the curtesy, tenant in dower, the incumbent of a benefice, and others that come in under by act of law, or in the post, shall be bound by, and take advantage of estoppels; and Coke, in his twenty-first reading on fines, says "estoppel is reciprocal on both sides; for he that shall not be concluded by a record or other matter of estoppel, shall not conclude another by it." *Doe* v. *Martin*, 8 Barn. & Cress. 497.

Now Kingman himself would not have been estopped by his deed to Holley from showing that *no title* passed by it, on the ground that it contains no covenant of warranty; and after acquired estate by a grantor passes to his previous grantee by the rule of estoppel only when there are such covenants of warranty, and then to avoid circuity of action. *Jackson* v. *Hubbell*, 1 Cowen, 616; *Jackson* v. *Bradford*, 4 Wend. 622; *Jackson* v. *Waldron*, 13 Wend. 178.

The plaintiff could not claim anything by the rule of estoppel, in respect to the deed executed by her husband to Holley. She is a stranger to it; her right to dower rests upon the title or estate which her husband acquired prior to his deed to Holley, and is derivable under his grantor. This would be a sufficient reason why she could not estop the grantee of her husband. There would be no mutuality, as she would not be bound by it. *Jewell* v. *Harrington*, 19 Wend. 471.

The plaintiff is not entitled to dower in any other lands than in which her husband, during the marriage, was seised of an estate of inheritance; and I think it clear that when she claims dower, the defendant is at liberty to show in his defence that her husband was not, during the marriage, seised of such an estate. *Gaunt* v. *Wainman*, 3 Bing. N. C. 69.

I am therefore of opinion that the judgment should be reversed, and that a *venire de novo* should be awarded by the Supreme Court, with costs, to abide the event.

Ruggles, Jones, Johnson, and Gray, JJ., concurred in the result of the preceding opinions.

Bronson, J., dissenting. As to one-half of the Erie Mills, the defendant derived his title and possession from George G. Kingman, the plaintiff's husband; and still holds under that title. So long as he thus holds, he is estopped from denying the seisin of the husband, in an action brought by the widow to recover her dower. *Hitchcock* v. *Harrington*, 6 John. 290; *Collins* v. *Torry*, 7 John. 278; *Hitchcock* v. *Carpenter*, 9 John. 344; *Davis* v. *Darrow*, 12 Wend. 65; *Bowne* v. *Potter*, 17 Wend. 164; *Sherwood* v. *Vandenburgh*, 2 Hill, 303.

Questionable as I think this doctrine was at the first (2 Hill, 308; 3 Hill, 518, 519), it has prevailed too long in this State to be now overturned by a judicial decision. If there is any good reason for changing the rule, the change should be made by the Legislature, and not by the courts.

In Maine and New Jersey the rule is the same as it is with us. *Kimball* v. *Kimball*, 2 Greenl. 226; *Nason* v. *Allen*, 6 Id. 243; *Hains* v. *Gardner*, 1 Fairf. 383; *Hamblin* v. *Bank of Cumberland*, 19 Me. (1 Appleton) 66; *English* v. *Wright*, Coxe (N. J.) Rep. 437. In Massachusetts it is the other way. *Small* v. *Procter*, 15 Mass. 495.

So long as those claiming under the husband have not been disturbed in the enjoyment of the property, there is no very good reason for allowing them to defeat the widow's claim to dower by setting up an outstanding title, which may never be asserted; and the current of adjudication in this State has not carried the estoppel beyond cases of that description. There is, I admit, no principle upon which the estoppel can be carried another step, and applied to a case where the husband's grantee has been obliged to purchase in a good outstanding title for the purpose of protecting his possession; and if the case of *Bowne* v. *Potter*, 17 Wend. 164, must be considered as going that length, I agree that it cannot be supported. But there is no such question in this case.

This writ of error has, I presume, been brought in consequence of the opinion which had been expressed by Mr. Justice Cowen and myself, and which opinion I still entertain, that originally the doctrine of estoppel was improperly applied to this class of cases. *Sherwood* v. *Vandenburgh*, 2 Hill, 308–9; *Osterhout* v. *Shoemaker*, 3 Id. 518–19. But it will be seen that neither of us felt at liberty to depart from the rule as it had been settled, nor do I feel so now. After an erroneous decision touching rights of property has been followed thirty or forty years, or even a much less time, the courts cannot retrace their steps without committing a new error nearly as great as the one at the first.

The defendant's counsel places great reliance upon a remark of Mr. Justice Cowen, to the effect, that although the point was too firmly established to be revised by the Supreme Court, it might still be a fit question for review in the Court of Errors. There was, I think, a good deal of irony in that remark. Surely the learned judge did not intend to be understood that what was settled law in one court, was not also good law in all the other courts of the State; that a justice of the Supreme Court, when sitting in his own court, was bound to decide one way, and when sitting in the Court of Errors, was at liberty to decide the other way. The thing is preposterous. The remark in question was made concerning a court which not only corrected erroneous decisions, but sometimes took the liberty of reforming the law itself, where it was supposed to need improvement. I claim no such prerogative.

I am of opinion that the judgment of the Supreme Court should be affirmed.

Gardiner, J., having been engaged professionally in the cause, gave no opinion.

Judgment reversed, and venire de novo *awarded.*[1]

WEDGE *v.* MOORE.

Supreme Judicial Court of Massachusetts. 1850.

[*Reported* 6 *Cush.* 8.]

This was an action to recover dower in certain lands in the town of Leverett in this county [of Franklin], and was submitted to the court upon the following agreed statement of facts: — The demandant was married on the 4th of March, 1819, to Curtis Wedge, who died on the 10th of May, 1849. The tenant has been in possession of the whole premises, in which dower is claimed, since 1835, receiving the rents and profits, and a demand was made upon him for dower on the 16th of July, 1849. Curtis Wedge derived his title to all the premises except a parcel called the mill lot, on which there was a saw-mill, from his father, Thomas Wedge. He also had a deed from said Thomas of one half in common and undivided of the mill lot, bearing date November 14, 1821, and from that time till the year 1832, he occupied the whole mill lot, as well as the other premises, occupying the whole in the same manner. In 1823, Curtis Wedge mortgaged the whole mill lot to one Chittenden, the demandant not releasing her dower therein. In 1824, he mortgaged all the premises excepting the mill lot, to the Massachusetts Hospital Life Insurance Company, to secure the payment of $400, the demandant releasing her dower therein. In May, 1830, he mortgaged the whole premises, including the mill lot, to Aretas Ferry and Francis Richardson, to secure the payment of notes amounting to between $300 and $400, in which conveyance the demandant did not release her dower. Ferry and Richardson afterwards obtained possession of the whole premises under their mortgage; paid and procured to be discharged the mortgages to Chittenden and to the Massachusetts Hospital Life Insurance Company, without the knowledge or consent of the mortgagor; and conveyed the whole premises to the tenant by a deed with general warranty.

The question of the value of the rent of the premises was submitted to a jury, who returned a verdict, assessing the yearly value of the whole premises at $130.41, and of the mill lot alone at $65.

If upon the foregoing facts, the demandant is entitled to dower in the whole premises, judgment is to be rendered in her favor, and dam-

[1] See *Averill* v. *Wilson*, 4 Barb. 180 (1848); *Finn* v. *Sleight*, 8 Barb. 401 (1850); *Kingman* v. *Sparrow*, 12 Barb. 201 (1851).

ages assessed at the rate found by the jury; and if she is entitled to dower only in the mill lot, damages are to be assessed at the rate found by the jury, as applicable to the mill lot.

A. Brainard, for the tenant.

E. Dickinson, for the demandant.

Shaw, C. J. Upon the facts agreed, the court are of opinion, that the demandant is entitled to recover her dower in the whole of the described premises, her husband having been seised thereof during the coverture.

First, as to the release of dower. [The discussion on this point is omitted.]

As to the other point, the case finds, that the demandant's husband had a deed from his father of one undivided half of the mill lot; that he occupied the lot, took upon himself to convey the whole, which gave him a freehold by disseisin; and the only title, by which the tenant claims the whole, is a deed from the demandant's husband; he is therefore estopped from denying his grantor's seisin.[1]

COAKLEY *v.* PERRY.

Supreme Court of Ohio. 1854.

[*Reported* 3 *Ohio St.* 344.]

Petition for dower; reserved in the District Court of Cuyahoga County.

This is a petition for the assignment of dower to the petitioner, Harriet Coakley, in the undivided fourth part of the original two-acre lot, number one hundred and seventy-four, in the city of Cleveland. It appears that petitioner, Harriet, was formerly the wife of Job Doan, since deceased, who, according to the allegations of the petition, was, during his marriage with the said Harriet, seised in fee simple of the real estate above mentioned, which, in December, 1825, he conveyed by deed duly executed, but in which said Harriet did not join, to Nathan Perry, who subsequently conveyed the same to the defendants. And the claim to the assignment of dower is predicated on the fact of the conveyance by Job Doan in his lifetime, with covenant of warranty, to Nathan Perry, under which it is alleged that the defendants derived title and occupy the premises. It is claimed that Job Doan acquired his title by inheritance from his father, Nathaniel Doan, deceased, who was said to have held the premises in his lifetime, by deed from Eben Hosmer, as collector of taxes, dated December 31, 1814.

It further appears in the case, that Nathan Perry purchased the premises in controversy, together with two other lots, from the execu-

[1] *See, accord., Gault* v. *Price*, 5 Rich. L. 525 (1852); *Evans* v. *Evans*, 29 Pa. 277 (1857); *Ward* v. *McIntosh*, 12 Ohio St. 231 (1861).

tors and heirs of Gideon Granger, deceased, and took a conveyance therefor in March, 1824, under which he immediately took possession, and occupied until his sale and conveyance to the defendants, who have ever since occupied the premises. That Gideon Granger in his lifetime, and his legal representatives after his decease, were in possession of the lots, and the reputed owners thereof; and that neither Job Doan, nor his ancestor, Nathaniel Doan, were ever in possession of the premises. And Nathan Perry testifies, that some time after he had taken possession of the property, "Job Doan came into his store, and said that his father had a tax title for the lots which he had purchased from Granger's heirs; that he did not consider the tax title of any value, but he had had some trouble with the matter, and that he would sell it for ten dollars, which he thought was no more than equitable for the trouble which he had been to, and the money he had expended. That witness asked him about the other heirs of his father, to which Doan replied, they had had no trouble, and did not claim anything. And that witness paid him the ten dollars, and took the deed of December, 1825, above mentioned. And further that neither Nathaniel Doan nor Job Doan, ever had, or claimed any right to possession under this tax title; and that he, Perry, gave the ten dollars as a gratuity, and it was so regarded by Job Doan himself.

Horace Foote, for the petitioner.

Wilson and *Wade* and *S. J. Andrews*, for defendants.

Bartley, J. The claim to dower in this case is founded solely on the assumption that the grantee of the husband, and those holding under him, are estopped to deny that their grantor had title. The petitioners have not sought to fortify their claim by any proof tending to show the validity of the tax title out of which it originated; and if the doctrine of estoppel fails them, their claim is without any legal foundation to rest upon.

It was formerly held in New York, and, perhaps, in several other States, that in an action for dower, brought by a widow against the grantee of her husband, or those holding under him, such grantee, and those deriving title from him, were estopped from denying the seisin of the husband. But this doctrine, after a very full examination, was overruled by the Court of Appeals in New York, in the case of *Sparrow* v. *Kingman*, 1 Comst. 242. And this adjudication has been repeatedly affirmed and recognized in subsequent reported decisions in that State. The same subject came under review, in the Supreme Court of the United States, in the case of *Blight's Lessee* v. *Rochester*, 12 Wheat. 535, in which it was held that the doctrine of estoppel, which forbids a party from denying the title under which he has received a conveyance, does not apply as between vendor and vendee, and especially, where the latter has not received possession from the former. In this case, Chief Justice Marshall traces the origin of the doctrine on this subject back to the feudal tenures, "when the connection between landlord and tenant was much more intimate than it is at present, when the

latter was bound to the former by ties not much less strict, nor much less sacred, than those of allegiance itself."

"The propriety," says Chief Justice Marshall, "of applying the doctrines between lessor and lessee, to a vendor and vendee, may well be doubted. The vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor. The rights of the vendor are intended to be extinguished by the sale, and he has no continuing interest in the maintenance of his title, unless he should be called upon in consequence of some covenant or warranty in his deed. The property having become by the sale the property of the vendee, he has a right to fortify that title by the purchase of any other, which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this, nor is either the letter or the spirit of the contract violated by it."

It was held in the case of *Watkins* v. *Holman*, 16 Peters, 54, that the relation of landlord and tenant, in no sense, existed between vendor and vendee. And Mr. Justice Story is reported to have said, in the case of *The Society etc.* v. *The Town of Pawlet etc.*, 4 Peters, 506, that "A vendee in fee derives his title from the vendor; but his title, although derivative, is adverse to that of the vendor. He enters and holds possession for himself, and not for the vendor." This doctrine has been fully recognized in Massachusetts, in the case of *Small* v. *Proctor*, 15 Mass. 495. And it is now held in New York, that the doctrine of estoppel, which had been formerly improperly applied to an action of dower brought by a widow against the grantee of her husband, or those claiming under him, was wanting in the vital principle of estoppel, which consists in mutuality.

The decisions in this country, in which the grantee and those claiming under him were held to be estopped to deny the title of the grantor, were cases in which the grantee received and held possession under the conveyance, and relied upon it as his source of title, and not where the grantee held the title under a prior and independent conveyance.

In the case before us Nathan Perry had purchased the land, received a conveyance, and was in possession prior to the conveyance from Job Doan, under a title upon which he, and those claiming under him, have relied since 1824. The conveyance from Doan was treated as of little or no value, and was plainly a mere measure of precaution on the part of Nathan Perry, by way of buying his peace and quieting his title. It would be the grossest absurdity to conclude that Nathan Perry, by taking the conveyance from Job Doan, for a trifling consideration, contemplated, instead of continuing seised of the whole premises, as he claimed to have been before, that he became seised of only an undivided part, in common with the other heirs of Job Doan's ancestor.

It would seem to be just and reasonable that a person in the *bona fide* possession of land under a claim of title, should be allowed to buy in any title, real or pretended, with a view to quiet the enjoyment of his possessions, and that the purchase of an adversary title, if it does

not strengthen, should certainly not have the effect to impair the title of the owner. It is not the policy of the law to deter persons from buying their peace, and compel them to submit to the expense and vexation of lawsuits, for fear of having their titles tainted by defects which they would gladly remedy by purchase, where it can be done with safety.

A claim to a dower estate in lands, upon a mere technicality, after a lapse of nearly thirty years, predicated on a tax title of the deceased husband, unsupported by any public record showing the validity or regularity of the tax sale, and under which the husband, in his lifetime, was not only never in possession, but never had asserted any right to the possession of the premises, is entitled to but little consideration in a court of justice. And my only surprise is, that I should have been induced myself, when presiding in the court on the circuit, by the urgent request of the learned counsel for the petitioners, to reserve the question in this case for decision by the court of last resort.

Petition dismissed at the costs of the petitioners.

GARDNER *v.* GREENE.

SUPREME COURT OF RHODE ISLAND. 1858.

[*Reported* 5 *R. I.* 104.]

BILL IN EQUITY by the plaintiff, as the widow of the late Jesse Gardner of North Kingstown, deceased, for the assignment of dower to her in two third parts of the Roome Farm, so called, lying in North Kingstown, against the defendant, as tenant in possession of the same.

The case was heard upon bill and answer, from which it appeared, that the farm, in a portion of which the plaintiff claimed dower, was formerly the property of Ezekiel Gardner of North Kingstown, who dying seised in 1814, left it, in lieu of dower, to his widow, Susannah, during widowhood, with remainder in fee to his three sons, Palmer, Jeffrey, and Jesse, the husband of the complainant. Susannah, the widow of Ezekiel, took possession of the estate under the will of her husband, and, never having married, continued to receive the rents and profits of it until her death, in 1830. After the death of his brother Jeffrey, upon whose interest in the farm he seems to have had a claim growing out of his payment of certain mortgages executed by Jeffrey upon it, Jesse, in September, 1820, applied to the Court of Probate of North Kingstown to divide the farm between himself, his brother Palmer, and the heirs of his brother Jeffrey, which was done by the court, they receiving, approving, and ordering to be recorded, the report of

[1] See, *accord.*, *Owen* v. *Robbins*, 19 Ill. 545 (1858).

the committee of division, on the 9th day of October, 1820. The report of the committee recited, that the farm was subject to the life estate of the widow of Ezekiel, and that the partition was made, subject to that estate. In the December following, Jesse purchased of the administrator of Jeffrey, empowered by the Supreme Judicial Court to make sale thereof for the payment of the debts of his intestate, all Jeffrey's interest in said farm; so that two thirds thereof, in remainder, became, and were, at that time, vested in him. The complainant, who had intermarried with him in 1809, joined with him, on the 13th day of June, 1821, in the conveyance of a wood lot, a portion of the farm, and released her dower therein; but on the 18th day of August, 1823, Jesse sold and conveyed to Nicholas C. Northup all his interest in the farm, by a deed in which the complainant did not join. The deed from Jesse to Northup was a deed poll, in common form, which described the farm "as two certain tracts of land," one, of about 264 acres, and the other, of about 32 acres, bounding them by the lands of adjoining proprietors, and contained a warranty of seisin in fee on the part of the grantor, — a warranty against all encumbrances, except two mortgages, one, executed by the three brothers, Jesse, Palmer, and Jeffrey, to Oliver Gardner, for $2,021, and the other, executed by Jesse alone to Jonathan W. Arnold for $3,549.95, — and a general covenant, to warrant and defend the granted estate against the lawful claims of all persons, with the above exceptions. Jesse, the husband, died intestate in August, 1855. It did not appear, either from the bill or answer, by what title, or under what claim, the respondent possessed the estate in which dower was sought; whether under Northup, the grantee of Jesse, or under the prior mortgagees, subject to whose claims Jesse sold; but merely, as stated in the bill, that he was "in the occupancy and possession of the said estate, claiming to own and enjoy the same against the rights of your oratrix."

The complainant claimed dower in the two thirds of the Roome Farm, set off by the probate division of 1820 to Jesse and Jeffrey, with the exception of the wood lot, in which she had released dower; and the respondent by his answer, resisted her claim, upon the ground, that on account of the life estate outstanding to Susannah Gardner during all the time of coverture that Jesse was interested in the farm, he had no such seisin as would entitle his widow to dower therein.

Bartlett and *T. A. Jenckes*, for complainant.

Wilkins Updike, for respondent.

Ames, C. J. It is not pretended in this case, and indeed cannot be, that a widow is dowable out of lands in which her husband had at no period during the coverture, any other estate than a reversion or remainder in fee, expectant upon the determination of an estate for life, or, what is the same thing for this purpose, expectant upon the determination of an estate during widowhood. 2 Co. Inst. 301. There could be no livery to such a remainder-man or reversioner at common law; the livery to the particular tenant inuring to his benefit, and he deemed to be "entitled," rather than "seised," in the strict sense

of that term. The reason given by Lord Coke why the wife shall not be endowed of a reversion, "albeit it is within the word tenements," is, "because there was no seisin in deed or law of the freehold." Co. Lit. 32 a. As our Statute gives dower only in "lands, tenements, and hereditaments, whereof the husband, or any other to his use, was *seised* of an estate of inheritance, at any time during the coverture," and the husband of the complainant parted with all his interest in the farm, out of which she here seeks dower, long previous to the expiry of the life-estate of his mother, and whilst he had only a remainder in it, it is evident, that the very ground for the complainant's claim, the seisin of her husband, of which her estate can be but a continuance, totally fails her. 1 Cruise, Dig. tit. Dower, p. 190.

Indeed, the ground taken for the complainant is not so much under the facts stated in the answer, that her husband really was seised during the coverture of this farm, as that the defendant in consequence of having set up in defence a conveyance of the farm by the husband to Nicholas C. Northup, with warranty of seisin, is, notwithstanding the actual existence of the life estate before and at the time of the conveyance, estopped to deny the fact of the seisin of the husband.

It is true that cases can be found from Maine, New York, and New Jersey, and following their lead, quite probably from other States, affirming, that the grantee of a fee-simple by deed-poll with covenants of warranty, who takes possession under his deed and is not actually evicted, cannot deny the seisin of his grantor against the claim of the grantor's widow for dower, but is estopped to deny it, as we understand the cases, by the acceptance of the deed with warranty and by receiving and holding possession under it. Even if this were good law, we do not see how it would help the case of the complainant; for it nowhere appears in the bill or answer, or in any exhibit appended to either, that the respondent claims title or holds possession, even mediately, under the deed executed to Northup; the bill merely stating him to be in possession, "claiming to own and enjoy this farm against the rights of your oratrix," and the answer setting up the conveyance, in connection with the outstanding life-estate, as disentitling the complainant to dower, without advancing any claim of title, under the deed, whatever. For aught that we know, the respondent claims this farm by title paramount to the husband of the complainant, or under mortgages in which she has joined as releasor of dower; for we cannot infer as the complainant would have us, in a case tried upon bill and answer, that the respondent claims under a title to a third person merely because he holds it up as a shield for his defence, when there is no averment of the claim either in bill or answer, and when, according to the view advanced by the complainant, it is the respondent's claiming and having received possession under a deed which makes the title conveyed by it of too little proof to protect him.

But the cases themselves, upon which this notion of estoppel is pretended, savor, we think, far more strongly of gallantry than of law.

Of course, a deed poll can never operate by way of estoppel *by deed*, against the grantee, for the simple reason that his seal is not to it; Co. Lit. 47 b, 363 b; nor, in consequence, as such an estoppel against the grantor; since, to exist at all, an estoppel of this sort must be mutual and reciprocal. Co. Lit. 352 a; *Gaunt* v. *Wainman*, 3 Bingh. N. C. 69; s. c. 32 Eng. C. L. R. 42; *Small* v. *Proctor*, 15 Mass. 495, 499; *Moore* v. *Eastman*, 5 N. H. 490; *Lansing* v. *Montgomery*, 2 Johns. R. 382; *Osterhaut* v. *Shoemaker*, 3 Hill. 519; *Sparrow* v. *King*, 1 Comst. (Appeals) R. 248; *Gardner* v. *Sharp*, 4 Wash. C. C. R. 609; *Miles* v. *Miles*, 8 Watts & Serg. 135; *Bolling* v. *Mayor*, 3 Rand. (Va.) R. 563; *Candler* v. *Lunsford*, 4 Dev. & Bat. (N. C.) R. 407. It is equally well settled, that an estoppel *in pais* is created by the acceptance of possession under a deed, only when the deed is accepted in one of those relations which imply an obligation to return the possession, and a sort of allegiance to him under whom, or in subjection to whose interests, it is held; such as, in the relation of landlord and tenant, trustee and *cestui que trust*, mortgagor and mortgagee. *Per* Baldwin, J., *Williston* v. *Watson*, 3 Pet. 47, 48; *Blight's Lessee* v. *Rochester*, 7 Wheat. 548; *Watkins* v. *Holman*, 16 Pet. 53, 54. Even in one of these relations, as of landlord and tenant, it exists only when possession has been received under the lease, and does not continue after the landlord's title has determined, or the tenant has been either actually or constructively evicted. *Doe* v. *Barton*, 11 Ad. & El. 307; s. c. 39 Eng. C. L. R. 99; *Doe* v. *Smith*, 4 M. & S. 347; *Doe* v. *Edwards*, 5 Barn. & Ad. 1065; *Doe* v. *Mills*, 2 Ad. & El. 17; *Doe* v. *Birchmore*, 9 Ib. 662. It is an extension of such an estoppel quite beyond its reason, to apply it to the ordinary relation of grantor and grantee, where the latter, claiming by virtue of his own purchased right and having paid his money for his title, is under no obligation whatever to his grantor, or to the widow claiming by virtue of his grantor's seisin, in regard to it. As said by Mr. Justice Wilde (*Small* v. *Proctor*, 15 Mass. 499), "The grantee may be permitted to show that his grantor was not seised, as is every day permitted in actions of covenant."

Indeed, it would seem little short of an absurdity to hold, that a party receiving possession under a deed is equitably estopped, as long as his possession continues, to deny the seisin of his grantor, because, along with the possession, he took covenants of warranty to guard him, as far as damages might, against the contemplated possibility that his grantor might not ultimately prove to be entitled to that which he affected to convey. And see *Smith* v. *Strong*, 14 Pick. 148; *Barker* v. *Talman*, 2 Mete. 32; *Osterhaut* v. *Shoemaker*; *Sparrow* v. *Kingman*, 1 Comst. (Appeals) R. 252-254; *Kenada* v. *Gardner*, 3 Barb. Sup. R. 589. The claim to dower, here pretended, finds as little support in the theory as in the pleadings of this case, and the bill must be dismissed, with costs.

SECTION IV.

EXECUTORY DEVISES.

NOTE. — See *Buckworth* v. *Thirkell*, 3 B. & P. 652 *n.* (1785), p. 690 *ante*.

RAY *v.* PUNG.

KING'S BENCH. 1822.

[*Reported* 5 *B. & Ald.* 561.]

THE *Vice-Chancellor* sent the following case for the opinion of this court.

By indentures of lease and release, dated the 25th and 26th September, 1800, certain lands, &c., in Essex, were duly conveyed and assigned by Golding Ray the elder, his heirs and assigns, to the use of such persons, and for such estates, and in such proportions, and for such terms of years, and under such provisoes, &c., and subject to such charges, and in such manner as James Ray, by any deed or deeds by him signed, sealed, and executed in the presence of, and attested by two or more credible witnesses, should from time to time declare, direct, limit, or appoint the same; and as to the estate or estates so to be appointed, if any should be, which should respectively end and determine; and as to such part and parts of the said premises whereof no such declaration, limitation, or appointment should be made, and in default of, and in the mean time, until any such should be made, to the use of James Ray, his heirs and assigns, forever. James Ray afterwards duly made, and executed, in the presence of two credible witnesses, certain indentures of lease, appointment and release, dated the 29th and 30th of March, 1816; by which it was witnessed, that James Ray, for the valuable consideration therein mentioned, by virtue of the power or authority to him given by the first-mentioned indentures, and of all and every other power and powers him in any wise enabling in that behalf, did irrevocably declare, limit, and appoint, that all the said lands, &c., should, from and after the execution of those indentures, remain and be to the uses upon the trusts, and for the intents and purposes thereinafter limited, expressed, and declared concerning the same; and by the same indenture it was also witnessed, that for the consideration aforesaid, and for further assurance, James Ray did grant, bargain, sell, release, and confirm unto the plaintiff, Golding Ray, the younger, in his possession then being by virtue of the said lease, and to his heirs, the said lands, &c.; to hold the same unto the said Golding Ray the younger, his heirs and assigns, to the uses, upon the trusts, and for the intents and purposes thereinafter expressed and declared

concerning the same; and it was by the same indenture declared, that as well the appointment as also the grant and release thereinbefore contained, should respectively operate and inure to certain uses, and upon certain trusts therein expressed and contained in favor of Golding Ray the younger. James Ray, at the time of the execution of the last-mentioned indentures in 1816, was married; and he and his wife are still living. The question for the opinion of the court was, whether, under the circumstances, the wife of James Ray would be dowable out of the lands, tenements, and hereditaments comprised in the hereinbefore stated indentures, in case of her surviving her husband. The case was argued at the sittings before last Michaelmas Term, by

Preston, for the plaintiff.

Barber, for the defendant.

Cur. adv. vult.

The following certificate was afterwards sent: —

This case has been argued before us; and we are of opinion, that under the circumstances, the wife of James Ray will not be dowable out of the lands, tenements, and hereditaments comprised in the hereinbefore stated indentures, in case of her surviving her husband.

C. Abbott. J. Bayley.
G. S. Holroyd. W. D. Best.

MOODY *v.* KING.

Common Pleas. 1825.

[*Reported* 2 *Bing.* 447.]

On the 4th March, 1802, William Frost the younger and Catherine Moody, the female plaintiff, intermarried. C. Moody continued the wife of W. Frost till his death. William Frost the elder, the father of W. F. the younger, was, at the time of making his will, and continued thereafter till the time of his death, seised in fee simple of the manor of Brinkley, otherwise Brinkley Hall, in the parishes of Brinkley, Weston, Willingham, and Carlton, in the County of Cambridge, and of divers houses and lands in the same parishes.

On the 6th of April, 1805, W. F. the elder duly made and published his last will and testament in writing, executed and attested, to pass freehold estates, in the words following: "I, W. F., give and bequeath to my son W. F. and his heirs forever, all my houses and lands, with all their appurtenances thereunto belonging; also I give to my well-beloved wife, Rebecca Frost, the sum of £100, of good and lawful money, yearly and every year during her natural life, to be paid her by the aforesaid W. F. half-yearly out of the estate; and if the said W. F. should have no children, child, or issue, the said estate is, on

the decease of the said W. F., to become the property of the heir-at-law, subject to such legacies as he the said W. F. may leave by will to any of the younger branches of the family."

W. F. did not revoke nor alter his said will, and died on the 25th August, 1807, leaving Rebecca, his wife, since deceased, and W. F. the younger, the devisee, him surviving; and upon the death of W. F. the elder, W. F. the younger took possession of the manor, houses, and lands so devised to him, and continued seised thereof or of part thereof, and of land allotted to W. F. the younger by the commissioners under an Act of Parliament for enclosing the parish of Brinkley, in lieu of the remainder thereof, under the will, till his death. On or about the 26th October, 1818, W. F. the younger died, and left C. Moody his widow and Rebecca, the wife of Robert King, his heiress-at-law him surviving. The manor, houses, and lands were subject to one or more long term or terms of years, created by W. F. the elder, or some former owner thereof, which were at the time of argument vested in some person, in trust for the persons entitled to the inheritance.

After the death of W. F. the younger, Robert King and his wife obtained a verdict in an action of ejectment, which they brought against C. Moody, then C. Frost, widow, and in June, 1820, they were put into possession of the said manor and other hereditaments devised.

In Trinity Term, 1 G. 4, King and his wife conveyed the estates by fine, to Robert William King, the defendant, in fee simple.

The plaintiffs intermarried in 1821, and filed their bill in Chancery, for a discovery and an account of the rents and profits of the estates, and to have dower assigned thereout to C. Moody, as the widow of W. F. the younger.

To this bill the defendant filed a demurrer.

On the 12th May, 1824, the demurrer came on to be heard before the *Vice-Chancellor*, when he directed the above case to be stated for the opinion of the Court of Common Pleas upon the question,

Whether the plaintiff, Catherine, was entitled to dower out of the estate which W. F. the younger took in the hereditaments mentioned in the will of his father, W. F. the elder? And now,

Wilde, Serjt., for the plaintiffs.

Cross, Serjt., *contra*.

Best, C. J. Lord Alvanly does not seem to approve the decision of Lord Mansfield in *Buckworth* v. *Thirkell*, 3 B. & P. 652, *note;* and according to his Lordship's account of it, the case *made a noise* in Westminster Hall at the time the judgment was given. The great respect I feel for Lord Alvanly and the bar, is such as to make me pause before I make up my mind as to the certificate that should be sent to the Vice-Chancellor. I must, however be permitted to say, that after a decision of the Court of King's Bench, which was much considered before it was pronounced, has remained unimpeached for

more than forty years, and has been confirmed by the case of *Goodenough* v. *Goodenough*, referred to in Mr. Preston's work on Abstracts, vol. iii. 372, we ought not to overturn it, unless it establishes a rule productive of injustice and inconvenience. Whatever conveyancers might have thought of the case when it was first decided, they have since considered it as having settled the law, and it would be productive of much confusion to unsettle it again. A woman by marriage not only surrenders to her husband the personal property of which she is then possessed, and profits of her real property, but also her capacity of acquiring property during her coverture; she has, therefore, an equitable claim to provision out of her husband's property on his death. Before trusts were introduced, and real estates were devisable, dower was the only mode by which a provision could be made for a married woman: if the husband did not specially endow her at the time of marriage, as by dower *ad ostium ecclesiæ*, the law in its justice gave her a third of the estate of which he died seised, for her life. A more suitable maintenance may now be secured to her by settlement; but if the husband omits to make a settlement, or the parties were at the time of the marriage poor, and afterwards by industry or good fortune he acquires an estate, she, whose fate is united to his for worse and better, cannot have a proper allowance better secured to her, if the husband should be indisposed to do what is just, than by the law of dower.

If there is any right that ought to be favored in a court of justice, it is the widow's right to an independent maintenance; but this right is to be attempted to be got rid of by a technical argument, by a mere quibble on words. It is admitted, that when an estate in fee is given to a man *if* he has children, his wife will be entitled to dower, although he has no child; but it is insisted, that if an estate in fee be given him *without* any such condition, and it is afterwards added, that if he has no children at the time of his death then the estate shall go to A. B., his wife is not dowable. This distinction is unworthy of a science which is to settle equitably the rights of the subjects of this country. The rule of law, as given us by Littleton, is simple and just. (Sect. 53.) "When the husband is seised of such an estate in tenements, &c., so as by possibility it may happen that the wife may have issue by her husband, and that the same issue may by possibility inherit the same tenements of such an estate as the husband hath, as heir to the husband of such tenements, she shall have her dower; otherwise not."

The children of William Frost must have inherited an estate in fee simple indefeasible, had any survived him, and the executory devise would have been at an end; the case of his widow comes within the rule in Littleton. It would be a strange anomaly, that the widow of one whose issue can only be tenants in tail, should be dowable, and she whose children would be tenants in fee by inheritance from their father, should not. It has been said at the bar, that the widows of tenants in tail were dowable, because such tenants might enlarge their estates into fee simple. This cannot be the reason, because from the

time of the passing the Statute *de donis* until the introduction of recoveries, which was not earlier than Edward the 3d, or, as some say, than Edward the 4th, estates tail could not be enlarged. There is no doubt, also, that when estates in fee simple conditional were first introduced, they were perpetual entails, and yet the wives of the tenants were dowable.

It has been said at the bar, that if you hold that Catherine Moody is entitled to dower, you must take it out of the estate of the person who has the executory devise, to whom she is a perfect stranger: this is not so; dower is part of the estate of the husband, as it is a part of tenant in tail's estate, who dies without issue, and not of that of the remainder-man.

The following certificate was afterwards sent: —

We have heard this case argued by counsel, and are of opinion, that the plaintiff, Catherine, is at law entitled to dower out of the estate which the said William Frost the younger took in the hereditaments mentioned under the said will of his father, William Frost the elder, with a *cesset executio* during the terms.

W. D. Best. J. Burrough,
J. A. Park. S. Gaselee.[1]

Note. — Loss of Dower. In the United States, a voluntary conveyance by a man, on the eve of marriage, unknown to the intended wife, and intended to deprive her of dower, can be set aside by her. *Smith* v. *Smith*, 2 Halst. Ch. 515 (1847). But see *Baker* v. *Chase*, 6 Hill, 482 (1844). *Secus* in England. See 1 Roper, Husband & Wife (2d ed.) 355, Jacob's note.

There is no dower in land which before the marriage a husband has agreed by an oral contract to sell, and which after the marriage he conveys accordingly. *Oldham* v. *Sale*, 1 B. Mon. 76 (1840).

The widow of a man attainted of treason had no dower even in the lands conveyed by him before the treason. *Gate* v. *Wiseman*, Dyer, 140 b (1557). But see *Sewall* v. *Lee*, 9 Mass. 363 (1812).

A claim of dower will not prevail against a dedication to public uses. *Gwynne* v. *Cincinnati*, 3 Ohio, 24 (1827).

By St. 13 Edw. I. (Westm. II.) (1285) *c.* 84, it is provided that "if a wife willingly leave her husband, and go away, and continue with her advouterer, she shall be barred forever of action to demand her dower that she ought to have of her husband's lands, if she be convict thereupon, except that her husband willingly, and without coercion of the Church, reconcile her, and suffer her to dwell with him; in which case she shall be restored to her action." On this Statute see 2 Inst. 435, 436; *Hethrington* v. *Graham*, 6 Bing. 135 (1829); *Woodward* v. *Dowse*, 10 C. B. N. S. 722 (1861); *Cogswell* v. *Tibbetts*, 3 N. H. 41 (1824); *Bell* v. *Nealy*, 1 Bail. 312 (1829). In many of the States this Statute is not in force, the laws concerning divorce having taken its place. *Lakin* v *Lakin*, 2 Allen, 45 (1861); *Bryan* v. *Batcheller*, 6 R. I. 543 (1860).

If a deed in which a wife has joined to release dower is set aside as in fraud of creditors, the right to dower revives. *Malloney* v. *Horan*, 49 N. Y. 111 (1872).

[1] See Co. Lit. 241 a, Butler's note; *Doe* v. *Hutton*, 3 B. & P. 643, 651–54 (1804); *Jones* v. *Hughes*, 27 Grat. 560 (1876); *Pollard* v. *Slaughter*, 92 N. C. 72 (1885).

SECTION V.

JOINTURES.

27 Henry VIII. (1536), c. 10, § VI. And be it further enacted by the authority aforesaid, that whereas divers persons have purchased, or have estate made and conveyed of and in divers lands, tenements and hereditaments unto them and to their wives, and to the heirs of the husband, or to the husband and to the wife, and to the heirs of their two bodies begotten, or to the heirs of one of their bodies begotten, or to the husband and to the wife for term of their lives, or for term of life of the said wife; (2) or where any such estate or purchase of any lands, tenements, or hereditaments, hath been or hereafter shall be made to any husband and to his wife, in manner and form expressed, or to any other person or persons, and to their heirs and assigns, to the use and behoof of the said husband and wife, or to the use of the wife, as is before rehearsed, for the jointer of the wife; (3) that then in every such case, every woman married, having such jointer made or hereafter to be made, shall not claim, nor have title to have any dower of the residue of the lands, tenements or hereditaments, that at any time were her said husband's, by whom she hath any such jointer, nor shall demand nor claim her dower of and against them that have the lands and inheritances of her said husband; (4) but if she have no such jointer, then she shall be admitted and enabled to pursue, have and demand her dower by writ of dower, after the due course and order of the common laws of this realm; this Act, or any law or provision made to the contrary thereof notwithstanding.

§ VII. Provided alway, that if any such woman be lawfully expulsed or evicted from her said jointer, or from any part thereof, without any fraud or covin, by lawful entry, action or by discontinuance of her husband, then every such woman shall be endowed of as much as the residue of her husband's tenements or hereditaments, whereof she was before dowable, as the same lands and tenements so evicted and expulsed shall amount or extend unto.

§ VIII. Provided also, that this Act, nor anything therein contained or expressed, extend or be in any wise hurtful or prejudicial to any woman or women heretofore being married, of, for or concerning such right, title, use, interest or possession, as they or any of them have, claim or pretend to have for her or their jointer or dower, of, in or to any manors, lands, tenements, or other hereditaments of any of their late husbands, being now dead or deceased; anything contained in this Act to the contrary notwithstanding.

§ IX. Provided also, that if any wife have, or hereafter shall have any manors, lands, tenements or hereditaments unto her given and assured after marriage, for term of her life, or otherwise in jointer, except the same assurance be to her made by Act of Parliament, and the said wife after that fortune to overlive her said husband, in whose time the said jointer was made or assured unto her, that then the same wife so overliving shall and may at her liberty, after the death of her said husband, refuse to have and take the lands and tenements so to her given, appointed or assured during the coverture, for term of her life, or otherwise in jointer, except the same assurance be to her made by Act of Parliament, as is aforesaid; (2) and thereupon to have, ask, demand and take her dower by writ of dower or otherwise, according to the common law, of and in all such lands, tenements and hereditaments as her husband was and stood seised of any state of inheritance at any time during the coverture, anything contained in this Act to the contrary thereof notwithstanding.

VERNON'S CASE.

COMMON PLEAS. 1572.

[*Reported* 4 *Co.* 1.]

IN a writ of dower brought by Mary Vernon against John Vernon, Esq., of the manor of Sudbury, in the County of Derby, the tenant pleaded, that her husband was also seised of certain lands in the same county in his demesne as of fee, and by deed indented, thereof enfeoffed Sir Thomas Gifford, Knight, and others and their heirs, to the use of himself for the term of his life, without impeachment of waste, and after his decease, to the use of the demandant, then his wife, for the term of her life: and after her decease to the use of the right heirs of the husband; and averred, that the said estate for life so limited to the said demandant, was for her jointure, and in full satisfaction of her dower, and that after the death of her husband, the demandant entered into the said land so limited to her for her jointure, and agreed to it: to which the demandant replied, and confessed the said feoffment, and the limitation of the uses, *scil.* to the use of the husband for his life, without impeachment of waste, and afterwards to the use of the demandant, for her life; but further said, that the limitation to the wife for life was upon condition that she should perform the last will of her husband; and showed all the will in certain, in which divers things were to be performed by the demandant, and demanded judgment if the tenant should be admitted and received to aver, that this estate so limited to the wife upon the said condition, was for the jointure of the wife, and in satisfaction of her dower; upon which matter the tenant demurred in law; and in this case five points were resolved: —

1st. That by the rule of the common law, a right or title which any one has to any lands or tenements of any estate of inheritance or freehold, cannot be barred by acceptance of any manner of collateral satisfaction or recompense: as if A. disseises B. tenant for life or in fee of the manor of Dale, and afterwards gives the manor of Sale to B. and his heirs, in full satisfaction of all his rights and actions which he has in or for the manor of Dale, which B. accepts, yet B. may enter into the manor of Dale, or recover it in any real action: for a right or title of freehold or inheritance cannot be barred by any collateral satisfaction, but by release or confirmation, or an act which tantamounts, and therefore it is commonly said in our books, that accord with satisfaction is a good plea in personal actions, where damages are only to be recovered, and not in real actions: *vide* 13 H. 7, 13, 20, &c. And that was the reason that no collateral satisfaction or recompense made to the wife in satisfaction of her dower, was any bar of her dower by the common law: but dower *ad ostium ecclesiæ*, or *ex assensu patris* concluded her of her dower, if she entered into the land so assigned, after the death of her husband: for the law allows them, being made in such form as the law requires, to be dowers in law. But if a man in consideration of a marriage afterwards to be had with A. makes an estate of certain lands to her for her life, in full satisfaction of all the dower which after marriage may accrue to her in any of his lands, and afterwards they intermarry, that was no bar of her dower at the common law, for two reasons; one, because she had no title of dower at the time of the acceptance of the satisfaction, but it accrued after; secondly, because no collateral satisfaction can bar any right or title of any inheritance or freehold, as hath been said, and thereby the doubt in 29 E. 3, 3, is well resolved. So if the husband purchases or causes an estate to be made to him and his wife for life, or in tail, in full satisfaction of her dower, and dies, that was no bar of her dower at the common law, *causa qua supra*: so if, after the death of the husband, the heir makes an estate to the wife for life of any land (whereof she is not dowable) in full satisfaction of her dower, that is no bar of her dower: *vide* the case now in the reports of the Lord Dyer, 1 Mar. 91, acc., and *vide* 31 E. 3, *scire facias* 99. Before the making of the Statute of 27 H. 8, *cap.* 10, the greatest part of the land in England was conveyed to sundry persons to uses; and forasmuch as a wife was not dowable of uses, her father or friends upon her marriage procured the husband to take an estate from his feoffees, or others seised to his use, to him and to his wife, before or after marriage, for their lives, or in tail, for a competent provision for the wife after the husband's death: then comes the Statute of 27 Hen. 8, which transfers the possession and estate of the lands to the use, by which the husbands were seised accordingly; and by consequence, if further provision had not been made, the wives would have as well their dowers as their jointures, for the reasons aforesaid; and for this reason the branches concerning jointures were added to the said Statute of 27 H. 8. And there-

fore it was resolved, that if this estate in the case at bar limited to the wife, was not within the said Act of 27 H. 8, that by the common law it was no bar of the demandant's dower, but that she should have both.

Secondly. It was resolved that if a man makes a feoffment to the use of himself for life, and afterwards to the use of his wife for her life, for the jointure of his wife, that such estate in remainder is within the intent of the said Act of 27 H. 8. For although the Statute expresses particularly these five forms, 1. To the husband and wife, and to the heirs of the husband; 2. To the husband and wife, and to the heirs of their two bodies; 3. To the husband and wife, and to the heirs of the body of one of them; 4. To the husband and his wife for their lives; 5. To the husband and wife for the life of the wife; and yet many other estates not there expressed are within this Act, for the said particular forms are put but for examples, and not to exclude any other estate, which is to such effect, and agrees with the intent of the makers of the Act; and although it was objected, that all the examples expressed in the Act are of a joint estate made to the husband and wife, and none of them to the wife only, nor by way of remainder; although by a proviso in the same Act, it is provided, "That if any wife shall have any manors, lands, &c. unto her assured after marriage, for the term of her life, or otherwise, in jointure, &c." so as the letter of the Act imports a joint estate, and that this word *junctura* implies a joint estate, and that the dowers of women are much favored in law; yet it was resolved, that all is of one effect as to the wife, to limit an estate to the husband and wife for their lives, and to the husband for his life, the remainder to the wife for her life; for the one estate is as beneficial to the wife as the other; *vide* after the case of Ashton as to this point. But it was resolved, that the estate which by force of this Act shall be in lieu and bar of her dower, ought by the limitations thereof to take effect immediately after the husband's death, for it plainly appears by all the examples expressed in the said Act, *scil.* that the estates of the wives shall take effect immediately after the death of their husbands; and therefore no other estate not expressed in the Act shall be taken by the equity of the Act, unless it has the same beginning for the benefit of the wives, as the examples purport: and therefore if the husband makes a feoffment in fee to the use of himself for life, and afterwards to the use of B. for his life, and afterwards to the use of his wife for life, for her jointure, it is not within the Act, although B. dies, living the husband; so if the husband makes a feoffment in fee to the use of A. for his life, and afterwards to the use of his wife for her life, for her jointure, it is not within the Act, although A. dies, living the husband. For in these, and other like cases, forasmuch as at the time of the limitation of the estates they were out of the Act, because it was not certain that the estate of the wife would take effect immediately by the death of the husband as it ought by the Act, no subsequent event can make them within the Act. For *quod ab initio non valet, in tractu temporis non con-*

valescet; et quæ malo sunt inchoata principio, vix est ut bono peragantur exitu: and therefore in all the said and the like cases, although the wife attains to them, and enters and takes the profits, yet she shall have the dower of the residue. For if the said Act doth not bar her, the common law, as has been said before, will not conclude her in such case of her dower. And the Lord Dyer said, that it was adjudged in Queen Mary's time, that where the Duke of Somerset purchased lands to him and to the Duchess his wife, and to the heirs male of their two bodies, that although it was not any of the estates put for example in the said Act, yet it was adjudged, that it was within the intent of it, which case you may see in the Lord Dyer's Rep. 1 Ma. 96. Also the Lord Dyer said that it was resolved in the time of Queen Elizabeth, that where one Ashton, in performance of covenants of a marriage to be had between his son and one A., made a feoffment to the use of A. for her life, for her jointure, and afterwards they intermarried, and the husband died, it was a jointure within the intent of the Act, and yet all the five examples are of estates made to the husband and wife: but in the said case of Ashton, the said estate was made before marriage, so that there was not any husband or wife at the time of the making of the estate; also the estate was only to the woman, where all the examples are of a joint estate, but all is of one effect, which case you may see M. 6 and 7 Eliz., Dyer, 228.

Thirdly, It was resolved, that although the estate limited to the wife was upon condition, and although dower (in lieu of which the jointure comes) at the common law was an absolute estate for life, yet forasmuch as an estate for life upon condition, is an estate for life, it was within the words and the intent of the Act, if the wife after the death of her husband accepts it; for it was agreed that a jointure is a competent livelihood of freehold for the wife to take effect, immediately after the death of the husband, for the life of the wife, if she herself is not the cause of the determination or forfeiture of it; and therefore if the husband makes a feoffment in fee to the use of his wife, for another's life, for her jointure, it is not within the Act, for the estate is not for the wife's life, and it may determine without her act or default, during her life, and thereby she will be destitute of a livelihood: but if a man makes a feoffment in fee to the use of himself for his life, and after to the use of his wife *durante viduitate sua* for her jointure, that is an estate for her life, and it cannot determine without her own act, and therefore it is a jointure within the said Act. The same law of an estate made to the wife for her life, upon condition; for if she does not break the condition, it is an estate to her for life. And in the case at the bar, if the condition binds her to any unreasonable thing, she might have waived it, but when she, after the death of her husband, enters and accepts the conditional estate for her jointure, she is barred of her dower.

Fourthly, It was resolved, that if a jointure is made to a woman before marriage, after the husband's death, the wife cannot waive it

and take her dower, as she may of a jointure made to her during the marriage, and that by force of the said proviso, the effect of which is, that if any woman hath any manors, lands, tenements, or hereditaments assured to her after marriage for term of her life, or otherwise in jointure, &c., that she, after the death of her husband, shall have liberty to refuse it; by which they resolved, that if the jointure was made before marriage, that the intent of the makers of the Act was, that she should not refuse, but should take such jointure as was made to her. *Vide* the case of Ashton put before as to this purpose. And it was said, if lands are conveyed to a woman before marriage, for part of her jointure, and after marriage more land is conveyed to her for her full jointure, and in satisfaction of her whole dower, and afterward the husband dies, in that case if the wife waives the land conveyed to her use after her marriage, she shall have the land conveyed to her before the marriage, and her dower also in the residue; for land conveyed to a woman in part of her jointure, or in satisfaction of part of her dower, is no bar (for the uncertainty) of any part of her dower. As if the debtor gives the creditor an horse, or any other thing in satisfaction of part of his debt, it shall be a bar for no part for the uncertainty. Also the words of the Act are, for the jointure of wives, and not for part of of their jointures.

Fifthly. It was resolved, that although, in the case at bar, the estate of the wife was upon express condition to perform his will, which imports a consideration of the making of the estate, yet it may be averred to be for the jointure of his wife, for the one consideration stands well with the other; and although it is not expressed in the deed, yet it may be averred, as the Lord Dyer said it was adjudged in the like case between *Villers and Beaumont*, in the time of Queen Mary, which you may now see in his reports 4 and 5, P. and M. 146. And in the case at bar the case is stronger, because the averment is given by the said Act of 27 H. 8, by the words in the Act, for the jointure of the wife; and in this case the Lord Dyer said, that the case of 6 E. 6, Br. Dower 69, was misreported; for true it is, that it was resolved, that an estate in fee-simple conveyed to the wife, was no jointure within the Statute, but that is to be intended within the Statute of 11 H. 7, 20, which restrains the alienation of women, which Act, neither in the letter nor in the meaning, can be intended when a woman has an estate in fee-simple; for to restrain such estate that it shall not be aliened, is repugnant and against the rule of the common law, and utterly out of the letter and intention of the Act: but he said that an estate in fee-simple conveyed to a woman for her jointure, and in satisfaction of her dower, is a jointure within the equity of the said Act of 27 H. 8, for that is a competent livelihood to the wife of an estate of freehold, to take effect immediately after the death of the husband for all the wife's life and more: and the Lord Dyer said, it was so resolved in *Sir Morris Dennis's Case*, which case is now reported 8 Eliz., Dyer, 248. And he said, that the reason reported by Brook, that a fee-simple is no

jointure within the said Act of 27 H. 8, is because such jointure is not mentioned in the Statute; but that is no reason in law for three reasons: 1st, Because the principal case at bar, and divers other cases put before, were out of the words of the Act, and yet were within the equity and intent of the Act. 2d, It agrees with the description of a jointure agreed and resolved before. 3d, He said, this estate in fee-simple was within the express letter of the Act, for the words of the said proviso are, "for term of life, or otherwise in jointure," which word "otherwise" extends to all other estates conveyed to the wife not mentioned before in the Act, which are as, or more, beneficial to the wife than the estates before-mentioned; for all other estates which are as beneficial to the wife, or more, as the estates mentioned in the Act, are within this word "otherwise." For *nota*, this word "otherwise" is not indefinite, but otherwise in jointure: *id est*, for a jointure, which is as much as to say, otherwise, having all the effect of the incidents to a jointure implied in the said five examples, or more: and if an estate for life, in tail, or fee-simple, is conveyed to the wife for her jointure, and after the death of the husband she is evicted, she shall recover her dower to the value in the residue, and shall have but an estate for life, of what estate soever her jointure is, by an express proviso in the said Act of 27 H. 8. So that upon eviction no greater prejudice shall accrue to the terre-tenant, if the jointure is of any estate of inheritance, than if it was but only for term of her life. And afterwards judgment in the principal case was given against the demandant. Note, reader, in the said case reported by the Lord Brook, it is further said, that a devise of land by the husband to the wife by will is no bar of her dower, for it is a benevolence, and not a jointure, *per Justiciar'* as it is there reported; and that is good law, if it is well understood. And as to that, some have said, that no estate devised by will can be a jointure within 27 H. 8, for two reasons: 1st, That by the said Act of 27 H. 8, the whole estate of the feoffees was transferred to *cestui que use*, and *per consequens* no land after the making of that Act was devisable till the Statute of 32 H. 8, and therefore a devise of land, which then by the law could not be made, cannot be within the said Act of 27 H. 8. The other reason was, because every jointure intended within the Act of 27 H. 8, is made and assured either before, or during the coverture, as appears by the said Act, but a devise takes its effect after the husband's death: but that neither of these is any reason in law, appears by the resolution following, Mich. 38 and 39 Eliz., between *Leak and Randall*, in the Court of Wards, it was resolved by the two Chief Justices *et tot' cur'* that if a man devises land to his wife for term of her life generally, it cannot be averred to be for the jointure of the wife, and in satisfaction of her dower for two reasons: 1st, Because a devise implies a consideration in itself, and therefore as a devise cannot be averred to be to the use of another than of the devisee, unless it is expressed in the will, no more can a devise be averred to be for a jointure, unless it is so expressed in the will. But as it is said in the

said case of 6 E. 6, it shall be taken for a benevolence, and so is the said case of 6 E. 6, to be intended. 2d, The whole will concerning lands by the Statutes of 32 and 34 H. 8, ought to be in writing, and no averment ought to be taken out of the will, which cannot be collected by the words contained in the will. But if a man devises land to a woman for term of her life, or in tail, &c., for her jointure, and in satisfaction of her dower, it was resolved that it is a jointure within the Act of 27 H. 8; for as an estate for life made to a woman for her jointure before marriage, when she is not his wife, is within the equity of the said Act, so an estate for life, devised to a woman for her life, which takes effect after his death, when the marriage is dissolved, is also within the equity of the said Act, for such estate well agrees with the intent of the makers of the said Act of 27 H. 8, and with the said description of a jointure made by the Justices in the said case of Vernon. And although land was not devisable until 32 H. 8, yet it is frequent in our books, that an Act made of late time shall be taken within the equity of an Act made long time before. As the Statute of Marlebridge, which was made *anno* 52 H. 5, gave the wardship of the heir of the tenant who held by knight's service, notwithstanding a feoffment made by collusion, at which time, and for two hundred years and more after, that is to say, until the Statute of 4 H. 7, *c.* 17, which gave the wardship to the heir of *cestui que use*, the heir of *cestui que use* was not in ward; and yet it is held in 27 H. 8, 9, a, b, that if *cestui que use* after the Statute of 4 H. 7, makes a feoffment in fee by collusion to defraud the lord of his ward, it is taken within the equity of the Statute of Marlebridge. Also the Statute *de Donis Conditionalibus* made 13 E. 1, as to the warranty of tenant in tail with assets is taken within the equity of the Statute of Gloucester, *cap.* 3, made *anno* 6 E. 1, as it is held in 11 E. 2, Garr. Stath. and (38) 43 E. 3, 23 b. For formedon in descender was given in lieu of a mortdancester. So the Statute of Westminster 2, *cap.* 25, made 13 E. 1, gave a certificate, but gave no adjournment, but adjournment is taken by equity of the Statute of Magna Charta, *cap.* 13, made 9 H. 3, as it is held 12 H. 4, 9 b. So the Statute of 7 R. 2 gave assize *in confinio comitatus*, and redisseisin taken by equity of the Statute of Merton, *c.* 3, made 20 H. 3, *vide* 1 E. 3, 25 b, and 12 Eliz., Dyer, 289. The Bishop of London being one of the High Commissioners, by force of the Act of 1 Reg. Eliz., was translated to the Archbishopric of York, yet his authority remained by force of the Act made *anno* 1 E. 6, *cap.* 7, and with this resolution in *Leak's Case*, aforesaid, agrees the case reported by the Lord Dyer, 5 Reg. Eliz. 220. A man seised of certain land in fee, held in socage, and of other land in tail held *in capite*, devised by his will in writing the third part of all his lands to his wife in recompense of her dower, and died; the wife entered into the third part of the land in fee-simple; and it was resolved, that it should be a bar of her dower by the said Act of 27 H. 8, *in curia wardorum*. Note, reader, a good difference, and all the opinions, which seem to disagree, well reconciled.

Know, reader, that by subtle and sinister counsel, an evasion out of the said Act of 27 H. 8 (as was intended), was devised, how women might have jointures and dowers also notwithstanding the said Act, and the invention was such: one Christian, who was the wife of one Richard Melles, of the County of Suffolk, had a jointure made of an house and certain land in Stoke Naylond in the County of Suffolk, to her husband and her, and to the heirs of the body of the husband, by one John Melles, uncle of the said Richard; which Richard was seised in fee of divers other lands in the same town, and afterwards Richard died; the wife with certain of her friends of her confederacy in a secret manner entered into the said tenements conveyed to her, and claimed them for her jointure and yet waived the possession, and brought a writ of dower to be endowed of the whole, as well of that which was assigned to her for her jointure as of the residue of her husband's lands and tenements, and had a full third part of the whole (accounting the land conveyed to her for her jointure to be parcel) assigned to her by the sheriff for her dower (not knowing the practice) only out of the said residue: and when she had her dower, then she openly entered into the said house and land conveyed to her for her jointure, which was held out by Thomas Purslow, the terre-tenant, and afterwards she married one John Sharp, who brought an action of trespass against the said Thomas Purslow, for a trespass done 10 June, *anno* 18 Eliz., in the house and land conveyed in jointure. And Purslow, by the advice of one of the Inner Temple, pleaded the feoffment of the said Richard to him and justified. To which the plaintiffs replied, that before Richard had anything, the said John was seised, and gave to her and her husband *ut supra*. To which the defendant rejoined, that the estate made to Richard and Christian was for the jointure of Christian, and that after the death of her husband, and before the trespass, she brought a writ of dower against the defendant then tenant of all the land whereof her husband was seised, and demanded the third part of all, recovered, and had execution out of the residue, and averred, that the house and land which was parcel of the land conveyed to her for her jointure was no part of the land assigned to her for her dower. To which the plaintiffs surrejoined, that the said Christian after the death of her husband, and before the writ of dower brought, entered into the said house claiming it for her jointure. To which the defendant by way of rebutter said, that to say that the said Christian after the death of her husband, and before the writ brought had entered, they should not be admitted against the said record of recovery in the said writ of dower: upon which the plaintiffs demurred in law, and it was argued by the plaintiff's counsel, that first, this bringing of the writ of dower cannot be any waiver of the estate of the wife, because by the entry of the wife she has agreed to the said estate, and was actually seised; and therefore she cannot afterwards waive and divest it out of her by the bringing of the said writ of dower. To which it was answered by the defendant's counsel, that admitting the wife could not waive it, yet she might well

bar and conclude herself from claiming the said estate, and in this case she had estopped herself to claim any estate in the house and land, in which, &c. For when she brings her writ of dower, and has judgment to have the third part of the whole, by that she affirms, that she has only title of dower, and *per consequens*, no estate; *ergo* she is estopped to claim any estate in any part of that whereof she has demanded by her writ to be endowed; as if the husband discontinues the wife's land, and dies, and the wife brings a writ of dower against the discontinuee, and recovers the third part, she is thereby estopped to bring a *cui in vita*, for by her writ of dower she claimed title of dower only, and thereby she shall be estopped to claim any other right by a *cui in vita: vide* 10 E. 3. Double Plea, 8. 20 E. 3. *Scire facias*, 13. F. N. B. 194. 17 Ass. 3. Acceptance of dower by deed indented, concludes the wife of her right, *vide* 11 H. 7, 20 b. So if she had brought her writ of dower to be endowed of the residue only, and had recovered her dower thereof, she should be estopped to claim any estate in the said house and land so conveyed to her, although she had entered before; for by the bringing of her writ of dower to be endowed of the residue, she has *tacite* affirmed, and that she has not agreed to any jointure made to her; for then she cannot bring any writ of dower by the said Act of 27 H. 8. And if the law should be otherwise, great inconvenience would ensue, which by no industry or policy can be prevented, as appears before; and for these reasons it was concluded, that the plaintiffs were in any case concluded from claiming the said house and land which, &c. *Quod fuit concessum per* Sir Christopher Wray, Chief Justice, Sir Thomas Gawdy, *et totam Curiam*. *Nota*, reader, *Simplicitas est legibus amica, et nimia subtilitas in jure reprobatur.*[1]

TINNEY *v.* TINNEY.

Chancery. 1743.

[*Reported* 3 *Atk.* 7.]

A bill was brought for dower, the defendant, the heir-at-law, insists that the husband in his lifetime gave a bond in a certain penalty in trust to secure to his wife £400 in case she survived, and that it was intended at the time in lieu of dower, and that she acknowledged it to be so, and offered to read evidence of her acknowledgment.

Lord Chancellor [Hardwicke]. I am of opinion that parol evidence cannot be allowed in this case; being within the Statute of Frauds and Perjuries, and that a *general provision* for a wife was not a bar of dower, unless expressed to be so. In the case of *Lawrence* v. *Lawrence*, 1 Eq. Ab. 218, Lord Somers held a devise of lands

[1] See *McCartee* v. *Teller*, 8 Wend. 267 (1831).

generally to the wife to be in bar of dower; it went up afterwards to the House of Lords, and the decree was reversed; in the case of *Vizard* v. *Longdale*, 5 Geo. 1, Sir Joseph Jekyll held the words in a bond to secure a sum of money for her livelihood and maintenance was no bar of dower, Lord Chancellor King was of opinion that it was a bar of dower, and said it was within the equity of the Statute of Henry VII. of Jointures, and therefore reversed Sir Joseph Jekyll's decree. (1 Ves. 55.)

BUCKINGHAMSHIRE *v.* DRURY.

House of Lords. 1761.

[*Reported* 2 *Ed.* 39, 60.]

By indenture, bearing date the 5th of October, 1737, and made between Sir Thomas Drury, then Thomas Drury, Esquire, of the first part; the defendant, then Martha Tyrell, spinster, one of the daughters of Sir John Tyrell, Baronet, deceased, of the second part; and Joseph Townsend, and Thomas Matthews, Esquires, of the third part; after reciting a marriage then intended between the said Sir Thomas Drury, and the defendant, it was declared and agreed that the said Sir Thomas Drury should be entitled to, and receive all the personal estate and effects which the defendant was possessed of, or entitled to, for his own use and benefit; and that all the lands, tenements, and hereditaments, then late of the said Sir John Tyrell, deceased, which should descend to or devolve upon the defendant during the intended coverture, should be settled and assured in manner thereinafter mentioned; and also that the defendant, in case she should survive the said Sir Thomas Drury, should have or enjoy an annuity or yearly sum of £600, clear of all taxes and deductions whatsoever, during her life, for and in the name of her jointure, and that the same should be taken and accepted by her in full satisfaction and bar of all dower or thirds of, in, to, or out of, any lands, tenements, or hereditaments whatsoever, whereof or wherein the said Sir Thomas Drury then was, or at any time thereafter, during the intended coverture, should be seised of any estate of inheritance, and also in lieu and full satisfaction of any share or distributory part of any personal estate which the said Sir Thomas Drury should be possessed of or entitled to, and which she could or might claim or demand by virtue of the Statute for the distribution of intestate's estates, or otherwise howsoever. And the said Sir Thomas Drury, in consideration of the said intended marriage, and of the portion which the defendant was possessed of, or entitled to, and which would accrue to him in case the said marriage should take effect, did, for himself, his heirs, executors, and administrators, covenant and agree to, with the said Joseph Townsend and Thomas Matthews, their executors and

administrators, that the heirs, executors, or administrators of him, the said Sir Thomas Drury, in case the defendant should survive him, should pay her, during her life, the yearly sum of £600, without any abatement whatsoever, half yearly; and also that in case any lands, tenements, and hereditaments of the said Sir John Tyrell, deceased, should in anywise descend, remain, accrue, or come to the defendant during her said coverture, then the said Sir Thomas Drury and the defendant should and would immediately thereupon convey, settle, and assure all such lands, tenements, and hereditaments, to the uses after mentioned; that is to say, to the use of the said Sir Thomas Drury during his life, and afterwards to the use of the defendant and her assigns during her life, and after her death to the use of the said Sir Thomas Drury and his heirs and assigns forever.

The deed was executed by the defendant in the presence of Mrs. Elizabeth Kellaway, her guardian, who was also a subscribing witness. The defendant was entitled to a portion not exceeding £2000; she was then an infant, being a month under the age of twenty-one.

On the 20th of January, 1750, Sir Thomas Drury died intestate, being seised in fee of an estate and mansion-house at Overstone, in the County of Northampton, of the yearly value of about £2600, and of a personal estate amounting to above £60,000. He left the defendant, his widow, and the plaintiffs, Mary Ann and Jocosa Catharina, his only children and co-heiresses-at-law.

The defendant, Lady Drury, having taken out letters of administration, and possessed herself of the personal estate, the present bill was filed by the daughters for an account of the rents and profits of the real estate, and of the personal estate, &c.

Lady Drury, by her answer, insisted, that as she was an infant when she executed the said indenture of settlement, and at the time of the marriage she could not, nor ought to be barred by the said indenture, but was at liberty to make her election whether she would accept the said annuity or waive the same, and take her dower out of the real estate, and her distributive share of the personal estate.

The cause was twice argued: first on the 27th, 28th, and 29th of February, 1760, by the *Solicitor-General*, *Wilbraham*, and *Browning*, for the plaintiffs; and the *Attorney-General*, *Hoskins*, and *Comyn*, for the defendant; and secondly, on the 3d, 4th, 6th and 7th of February, 1761, by the *Solicitor-General*, *Perrot*, *Wilbraham*, and *Stainsby*, for the plaintiffs; and the *Attorney-General*, *Sewell*, and *Hoskins*, for the defendant.

[Lord Northington, C., decreed that Lady Drury was not barred of her dower nor of her share of his personal estate.

The Earl of Buckinghamshire and Mary Ann Drury intermarried, the cause was revived, and an appeal brought to the House of Lords.]

After hearing counsel on this appeal, it was proposed to ask the opinion of the judges upon a point of law, and they were accordingly directed to deliver their opinions to the House upon the following

question: viz. "Whether a woman, married under the age of twenty-one years, having before such marriage a jointure made to her in bar of her dower, is thereby bound and barred of dower within the Statute 27 Hen. 8, *c.* 10?"

The judges, seven of whom were present, differing among themselves, were directed to deliver their opinions *seriatim*, with their reasons. Accordingly, Mr. Baron Gould, the Lord Chief Baron (Parker), and the Lord Chief Justice of the Common Pleas (Pratt), delivered their opinions in the negative. Mr. Justice Wilmot, Mr. Justice Bathurst, Mr. Baron Adams, and Mr. Baron Smythe, in the affirmative.

The Earl of Hardwicke. I concur entirely in opinion with the majority of the judges, but I do not think it necessary to resume the arguments at large, but shall only take notice of such of them as lead to the determination of the merits. For their opinion on that point is not conclusive, though it was necessary that they should be taken from the declaration in the decree, because equity follows the law, and to know whether the infant would have been bound by a legal jointure. I shall therefore rely on the opinion of the four judges; but I must observe thus much, that the time which has elapsed since the Statute, and the silence and want of resolutions on this head, are stronger arguments than a great many cases: for it shows this point has never till now (and it is two hundred and thirty-five years since the Statute) been called in question.

The practice of marrying young persons of fortune under age was more frequent in those days than in later times; the reason was from the law of tenures and wardships. For if a man died, leaving a son or daughter under age, the lord would be entitled to the marriage, and otherwise to have the *valor maritagii:* therefore it is clear a father, as soon as his son or daughter came to a marriageable age, would himself choose a marriage for them. This shows that these marriages and jointures on infants must have been more frequent than in modern times. The lord, too, was equally forward; for if the father died, and his child was unmarried, the lord would tender marriage as soon as the child attained the marriageable age; for otherwise he might lose the marriage.

One thing on this Statute was truly laid down, that the retrospective provision is penned in the same manner as that for the future: and that if the Statute did not bind such women as were then married, it did not bar them of dower; and then would not have cured half the mischief; and certainly, from the reason of tenure, above half were married under age at that time.

Another thing was mentioned by Mr. Justice Wilmot, who began for the affirmative, and entered largely into the subject, and explained the nature of jointures very ably, and threw a new light on the cause by entering into the law relating to provisions and settlements of this kind, as they stood before and at the making of the Statute: he said,

that the Statute intended to create a bar by jointures then made, or after to be made, without any regard to a contract.

The Chief Justice of the Common Pleas puts it upon the foot of a contract. But the recital of the Statute supposes the contrary: for it recites the instances of settlements of inheritances, and they might be made by ancestors of the husband. Where then is the contract? But the Chief Justice gave a definition of a jointure, that it was a contract for a provision for the wife after the death of the husband. I say, no book defines it so. Lord Coke and others say, it is a *provision of livelihood*, but do not take in the word or idea of *contract*. I was therefore surprised at the positiveness with which this was asserted.

Let us reflect on the usage in families before this law. In most great families a particular estate was kept in that state, and usually so settled from generation to generation. In most great families there is a house that is called the jointure-house, and the case in Dyer (*Ashton's Case*, 228 a) proves that if a father or grandfather settles on his son or grandson, and such woman as he shall marry, it is a good jointure. Where in such case can be the contract? The wife is supposed to rely on that when she marries.

As to the cases of *Price* v. *Seys* [Barnard. Ch. 117], and *Harvey* v. *Ashley* [3 Atk. 607], it has been affirmed that they were determined singly, upon the authority of the 1 Inst. 37. I believe that book was produced; but as to their proceeding singly upon that *dictum*, I deny it. Though the passage is very material, and the counsel argued upon the observation, "that a jointure made to her under or above the age of nine years is *good*," contending that it meant *good* to bind both parties. For otherwise, as Lord Coke was so accurate a writer, it is probable that he would have gone on and said, "unless the wife was an infant." Neither was it that authority that determined Sir D. Ryder, in the case of *Harvey* v. *Ashley*, to give up that point, and admit in words that the infant was bound by it, and barred of her dower.

Another thing was said, that the authorities cited were cobwebs thrown over the Statutes. I rather think they are lights upon the Statute. One of those lights was what is mentioned by Hale in the margin of the 1st Inst. which was treated with great disregard [here his Lordship pronounced a high encomium on Lord Hale, and said he had always been looked upon as one of the greatest luminaries of the law], and though it was called a private note, his MS. authority had been always highly esteemed; the original was given by Lord Hale to the brother of Phillips Gybbon, who lent it me when I was young at the bar: and, in the original book, cases are cited in the margin under Lord Hale's own hand, written in his strongest time, when he was Judge of the Common Pleas, before the Restoration. Lord Chief Justice Holt, who was as great and able a judge as ever sat in the King's Bench (except Hale), when he doubted of points of law, has borrowed manuscripts of Hale's family to decide

his opinion. I think, therefore, that things from reverend hands deserve to be treated with reverence.

The opinion of conveyancers in all times, and their constant course, is of great weight. They are to advise, and if their opinion is not to prevail, must every case come to law? No; the received opinion ought to govern. The ablest men in the profession have been conveyancers. Sir Orlando Bridgeman; (a book of whose precedents has been published), Webb, a great practiser in the King's Bench, was an able conveyancer, and the present Mr. Filmer.

In the next place, the judgment and established practice of the Court of Chancery is I think of the greatest weight.

From these considerations I take it for granted, that the law and foundation of this case is settled that an infant, having a proper jointure made, is bound and barred by it.

The next thing is the consideration of equity, whether the jointure, or an equivalent to it, will not bind in a court of equity? To determine this let us define what is a jointure. The law does not say a contract for, but a competent provision of, livelihood. Then the general rule is, equity follows the law in the substance, though not in the mode and circumstances of the case. Therefore, if that has been done which is equivalent to what the law would call a jointure or conveyance of any other nature, it will bind in equity. Every certain provision with consent of the wife, parents, or guardian, though not a jointure within the Statute 27 H. 8, is good in equity. This is built on maxims of equity, which regards the substance and not the forms. What for good considerations is agreed to be done, is considered as done, and allowed all the consequences and effects as if actually done; especially if the condition of the parties is changed, for that cannot be rescinded; so what is fairly done before ought to be established. This jurisdiction of equity is grown up from necessity from the change of circumstances and times, and to comply with the occasions of families and the exigencies of mankind.

As property stood at the time of the Statute, personal estate was then of little or trifling value; copyholds had hardly then acquired their full strength, trusts of estates in land did not arise till many years after, (I wonder how they ever happened to do so). But the chief kind of property then regarded was freehold estate in land, and so the Statute applied to that only. But how many species of property have grown up since by new improvements, commerce, and from the funds. Equity has therefore held, that where such provision has been made before marriage, out of any of these, she shall be bound by it. Consider how many jointures there are now made on women out of the funds, and none of them within the Statute 27 H. 8. So multitudes of jointures out of trust estates, not one of them within the Statute; yet equity has always supported them. So also of copyhold lands.

The case of *Jordan* v. *Savage* [2 Eq. Cas. Ab. 101] was decreed by Lord King. [Here his Lordship gave a great character of him, and

remarked, that he had been Chief Justice of C. B.; in which court only writs of dower can be brought:] And though it has been said she took possession of the lands limited to her for jointure by the articles, I answer that the question was upon the free bench, which extended to the whole land, therefore her entry upon part of the land did not bar her of the rest.

Vizard v. *Longden*, in which I was counsel, was also decided by Lord King. That was a bill brought by the brother of the husband, who died intestate, against the widow, for an account of the personal estate, and to be relieved against her claim of dower by reason of an agreement contained in a condition of a bond entered into before marriage. She by her answer said, that her husband agreed to settle on her a clear annuity of £14 per annum; and no particular lands were mentioned (omitting in her answer the words which were in the condition, for her provision and maintenance), and prayed to have the annuity made good out of the real estate, the personal being deficient, and also to have her dower. The Master of the Rolls declared in his decree, that there was not any sufficient proof of the averment, that it was in bar of dower, and so decreed the £14 per annum to be made good out of the real estate, and also dower. But Lord King reversed the decree upon consideration, and declared she was only entitled to the £14 per annum out of the real estate of her husband, by virtue of the bond, and that the said £14 per annum was a bar of dower out of the residue. 1st. I observe this bond must have been general, without mentioning specific lands, because she claimed on this footing, that the personal estate was insufficient to answer the annuity. 2dly. That the Master of the Rolls had no doubt but that this general agreement had been a sufficient bar of dower, provided it had been sufficiently expressed or proved that it was so agreed.

Another case is *Davila* v. *Davila*, 2 Vern. 724, before Lord Cowper. Covenant, in consideration of the intended marriage and £1000 portion, to pay his wife, if she survived him, £1500 in a month after his death, in full of dower; thirds by the custom of London, or otherwise, out of his real or personal estate. The husband died intestate, without issue, and the widow brought a bill against the administrator, to have a moiety of the personal estate by the Statute of Distribution; to which this covenant was pleaded by the administrator, and that he was ready to pay the £1500, and Lord Cowper allowed the plea, and said, "that possibly the husband might think it not necessary to make a will, and devise the estate to the next of kin, because he knew his wife was barred by the agreement;" against that decree there was no complaint or appeal.

I have already alluded to a number of cases of jointures out of the funds; many must have been on infants. What confusion might not this introduce in families, if parties were to be left to their legal rights? These cases were so frequent in courts of equity, that reports, and even notes, ceased to be taken of them.

But it has been said, the agreement in the present case was originally vicious, by reason of particular defects in it: that nothing certain is contained, no particular lands specified, and no remedy for the wife to compel the husband in his life. But the cases I have mentioned, and also the case upon Lord Lechmere's marriage articles, where it was only a general covenant, are all answers to the objections. And besides, there are two other answers. 1st, If there had been danger of Sir T. Drury's dissipating, and he had spent this equitable jointure, that would have been an eviction in equity, and consequently would have given her right to dower, like the case of an eviction at law; for equity pursues the reason of the law. 2dly, But he could not have spent it, *i. e.* not his real estate; for, if any one was about to purchase, he would certainly have asked whether Sir Thomas was married, if his lady was jointured, and when this was produced would have seen a settlement, or insisted on a settlement being made, or that the wife should join in a fine.

Another objection was, that the covenant is too short, but the agreement is general, whereas the covenant is, that his heirs, &c. after, &c. shall pay: therefore, that as there is no covenant for himself, there was no remedy to compel him in his lifetime. But I differ from that: for I think, upon the first clause, that she might by her next friend have brought a bill to compel him, because it is a general agreement, that she should have the annuity for, and in the name of, her jointure, which are the proper legal words, and the language of pleading. Then has he not covenanted in every circumstance to make a jointure, one property of which is to take effect immediately in possession on the death of the husband, which could not be unless it was settled in the life of the husband?

Another objection was, that this was an inadequate jointure; a hard bargain. But this is a clear annuity of £600 (here his Lordship mentioned the lady's circumstances).

I cannot conclude this head without resorting back to the long-established course of the Court of Chancery in the case of infants, who are under the care of that court. Many came before me whilst I sat there, in families of the first quality.

One I particularly remember, which I would mention, because it includes my great predecessor. The Duke of Hamilton married Miss Spencer, who had £10,000 in money, and a considerable real estate. There was a reference to the master, for the duke to make proposals: the report being defective, it was sent back; and then it came before me, and I concurred in it.

But it is objected, that the Court of Chancery does no more than the father or guardian, the best it can, but the infant has the same privilege to waive when she comes of age. When this was the only answer given by so able an advocate as the Solicitor-General (Sir Fletcher Norton), I conclude it unanswerable; for this is no answer at all. It is saying no more than that this great court draws in and deludes

families. People think, when they resort to that court in respect of infants, that it has a sovereign jurisdiction for what they do, and that trustees and all are indemnified. And what is so done must be in the case of infants.

It is improper for me to mention my own precedents; but in this practice I followed a great example, Lord Nottingham (and here his Lordship enumerated all the Chancellors, including Lord Talbot). Have they all concurred to draw in and delude families? If this should be law, every one of us deserved to have been impeached, as being guilty of the greatest abuse and delusion of families. Such a series of practice and precedents make the law. A great part of the common law is so. What, therefore, might not be the consequence of overturning all this established course?

Then the inconveniences of persons claiming under family settlements; remainder-men may have a third part of their estates torn from them, and the jointure perhaps go to another. Nay, purchasers for valuable considerations may be prejudiced, for they can have no relief if the woman is not bound. And no person of a great estate will be able to marry an infant, unless she finds surety to bar herself at twenty-one by a fine. Beauty, virtue, and merit, cannot always find such surety. If this decree should stand, it must stand irretrievably, for I cannot think how any Statute could be devised to reform it. There was considerable difficulty in framing the Statute of Wills. But these cases are so various, it would be impossible to imagine all the cases which are fit to be cured, and which are not.

The second general point is, whether she is barred of her distributory share of the personal estate. This, as to the value, is the material point.

If anything can be clear in equity, it is this: if such agreements are fairly entered into, they will be decreed. It is truly objected, that a proper Statute jointure could not bar this. But yet, if such a jointure had gone on in such words, or to the same effect as those which have been used in the present case, it would have excluded her. I have seen many such precedents: some concerning wives of citizens of London, where the customary right has been allowed to be barred by a jointure, and the wife is said to be compounded with.

2 Vern. 665, *Hancock* v. *Hancock*, where a wife of a freeman of London is compounded with before marriage, by having a jointure, though of land; she is taken as advanced, and the children shall have her moiety as if she was dead, 1 Vern. 6, *Love's Case*. If this is allowed in such case of a custom, *a fortiori* in personal estate not within the custom; for in the case of the custom she has a sort of paramount right superior to her husband.

It is objected that this arises from agreement; but that an infant cannot agree. But certainly an infant so near of age, wanting only two months, might bind herself as to personal rights. She was capable of devising away all her own personal estate. This is not so strong. It

is not to deprive her of her own, but to exclude her of the contingency of any part of her husband's personal estate. And here he has in effect said, so far I make my will already, that you shall not have any part of it.

All these contracts are looked on to be for the benefit of the husband and his family, that if he dies intestate, his children or family, and not his wife, should have his personal estate. See the case of *Davila* v. *Davila*, before cited, and Lord Cowper's reasoning at the end of the case; that the husband might think it not necessary to make a will, because he might consider his wife barred by the agreement.

A contrary construction would be to make this adult infant commit a fraud upon her husband, by claiming in contradiction to the articles. But minors are not allowed to take advantage of infancy to support a fraud. There was a decree by Lord Cowper (analogous to the case in 2 Leo. 108, of *Piggot* v. *Russell*), where tenant in tail applied to borrow money on a mortgage, the attorney's clerk who engrossed the deed, was the issue in tail, was then about the age of eighteen, and knew of his being issue in tail, but took no notice of it. Lord Cowper relieved against this minor, and would not suffer him to take advantage of his own fraud.

In this case I must take it Sir Thomas Drury relied on this agreement, and therefore made no will, and otherwise that he was drawn in and deceived.

Lord Mansfield. The general question is, if Lady Drury, having the provision stipulated for her by her marriage articles, is not barred of her dower. I entirely agree with the noble and learned lord who spoke last, that a jointure is not a contract, but a provision made by the husband, &c., as defined by Lord Coke, and therefore, that the consequence drawn from an infant's incapacity of contracting is ill-founded. I must also deny what has been advanced in the argument of the present case, that either by the law of England, or any other law, every contract made by an infant is void. (Here his Lordship cited the words of the *Edictum perpetuum de Min., tit.* 4 : *Quod cum minore gestum esse dicitur, uti quæque res erit, animadvertas.*)

By our law some agreements bind absolutely, some are void, some are voidable. Contracts for necessaries, such as diet, education, &c. are good (Bac. on Uses, *versus finem*), and the infant's body liable to be taken in execution for them. So of a sum advanced for taking an infant out of jail. Infancy never authorizes fraud; as, if goods were delivered to an infant, and he embezzle them, trover would lie against him; or if he took an estate, and was to pay rent for it, he should not hold the estate, and defend himself against payment of the rent, by pretence of infancy. If an infant pays money with his own hand, with a valuable consideration for it, he cannot get it back again. If he receives rents, he cannot demand them again when of age. In *Watts* v. *Haiswell and Treswick*, where the issue in tail being eighteen years old, himself engrossed the mortgage deed made by his father, and did

not discover his right to the mortgage, Lord Cowper held him bound thereby, because, being of years of discretion, he had acted dishonestly in not discovering his title, and expressed his assent to the rule that had been laid down, of infants deriving their protection from those they contracted with, *i. e.* from the nature of the contract, if fair or otherwise.

Were infants not bound by such agreements as this, no lady could marry under age without her father or some near friends becoming security that she would, when of full age, join in a fine to bar herself of dower, which, if she should afterwards refuse to do, the husband must have his remedy for a collateral satisfaction against the heir of her father, or such next friend, which would make wild work. I approve the distinction made by Mr. Justice Wilmot between infants contracting for conveying away something of their own, and where for barring themselves of a right which is a third person's.

Consider the agreement in this case, and what the circumstances of it are. It is an agreement for the infant's advancement. Marriage is so. What sort of a marriage? With the consent of her father or guardian. Lady Drury was then nearly twenty-one: there is no objection to the fairness of the transaction. She had only £2000 for her fortune; it was an advantageous bargain for her at the time.

Better terms may be obtained for infants by parents and guardians than when they are of full age: by much the greatest number of women are married when under age: but they are not thereby to be made an instrument to defraud others, for there is no difference in effect whether the fraud be premeditated, or the circumstances by subsequent events be turned into fraud. If the Statute of Hen. 8 had never been made, courts of equity would have given relief; but I am clearly of opinion that infants are barred under that Statute. That Act was made for uses, not for jointures: this is a provision arising out of the general consequences of uses.

Consider also the usage and transactions of mankind upon it: the object of all laws, with regard to real property, is quiet and repose. As to practice, there has almost been only one opinion. The greatest conveyancers; the whole profession of the law; Sir Orlando Bridgeman: Lord Nottingham: there was not a doubt at the bar in *Harvey* v. *Ashley:* Mr. Fazakerly always took it for granted that infants were bound.

If this decree were to stand, marriage settlements would be totally subverted without the interposition of the Legislature; and I concur with the noble and learned lord, that no man living could draw such an Act of Parliament. I will never put such an exposition on the law, as to make it necessary to apply to Parliament to rectify it.[1]

[1] See 1 Rop. H. & W. (2d ed.) 486, *n.*

CARUTHERS *v.* CARUTHERS.

CHANCERY. 1794.

[*Reported* 4 *Bro. C. C.* 500.]

MASTER OF THE ROLLS.[1] [SIR RICHARD PEPPER ARDEN.] This is a case of great importance. The prayer of the bill is, that the defendant, the widow, may be declared not to be entitled to any right of dower, or free bench, or thirds of the personal estate of the intestate, her husband, but to be debarred of the same by the provision made her by the settlements, on the marriage; and the case is this: —

Previous to the marriage of the intestate with the defendant, who was an infant of the age of seventeen, a certain estate which was in the possession of his mother was settled on the mother for life, remainder to the husband for life, remainder, if she should survive the mother and husband, to the intended wife for life, as part of the jointure and provision intended to be made and secured for her, and in lieu, bar, recompense, and full satisfaction of all demands, or thirds at common law, or by custom or otherwise, of all and every the messuages, &c., as the husband might during the coverture be seised of. "No notice is taken in this settlement what was to be the other part of the jointure or provision to be made for her; but also before the marriage, Thomas Palling, who was the uncle of the husband, made a surrender of copyhold, which was recited to be for making some further provision for the marriage, which was to the use of himself for life, remainder to the husband for life, remainder to the wife for life, if she should so long continue a widow. It does not state it to be in bar of dower, but it is impossible not to see, that it was that further provision which was referred to in the former deed; and the question is, Whether she is not bound to take these provisions in bar of dower.

The husband afterwards acquired a larger copyhold estate, in which, by the custom of the manor, she takes the whole for life.

It is contended, that by the case of *Drury* v. *Drury*, or *Drury* v. *The Earl of Bucks* (by which name it is reported in 5 Brown's Parl. Cases), this principle has been determined, that an infant is bound at law by a jointure, and in equity will be bound by any covenant for securing a jointure, or by any collateral satisfaction, whether the same be of freehold or not: that the law has given guardians authority to bind infants by such a settlement.

To the propositions thus largely laid down, I acknowledge I must make some objection.

It is said, that great judges have laid it down, that by such a settlement, made during the infancy of a female infant, her own estate would

[1] The opinion only is here given.

be bound, and for this *Cannel* v. *Buckle*, 2 Wms. 242, and *Harvey* v. *Ashley*, 3 Atk. 607, have been cited.

But in those cases this was not the point decided, although something like the principle is laid down, and it appears to have been the opinion of those judges, that such was the power of guardians, and that, having the power of marrying their wards, they must have that of making the collateral contracts.

But I hardly think it probable that Lord Hardwicke laid it down so broadly. It is impossible to apply the principle more strongly as to a female than to a male infant, and as to male infants no such doctrine has been laid down. There has been no such decision, nor was that proposition insisted on in *Drury* v. *Drury*.

In *Durnford* v. *Lane*, 1 Bro. C. C. 106, the principle came in question; that was a new case; the husband there was an adult, the wife was an infant. It was an attempt to bind the estate of the wife. Lord Thurlow had great doubts upon the subject. He held the husband bound by his own covenant, leaving the question open, how far it bound the wife.

But there is a case in which the question came directly before the court. It is *Clough* v. *Clough*, in Mr. Woodeson's Systematic View, vol. iii. p. 453, *n*. It was to carry into effect a settlement made before marriage of the widow, Patty Clough, while she was an infant. The decree declared that her estate was not bound by the marriage articles, and the bill was dismissed; that is an express decision by Lord Thurlow, that the contracts of male and female infants do not bind their estates, and though that is not a case of dower, it has weight in this case, and though it has not the sanction of the House of Lords, it is the opinion of a great judge.

The only question then is, Whether the case of dower be an exception to the general rule.

It is said, the case of *Drury* v. *Drury* is decisive, and that no judge ought to set up his private opinion against it.

The fair question is, What is decided by that case?

It may be said that no judge should contradict that case, but that it will only apply where exactly the same case occurs.

But I shall always hold myself bound, when I find a case so determined, not only by the case itself, but by all the principles which necessarily apply to it. I hold it a duty of a judge, where he finds a case determined by the House of Lords, to hold himself bound by all the principles which were necessary to its determination.

What was the question there? Lord Northington, when the case was before him, was of opinion that a jointure at law, though accompanied with every requisite of a jointure, would not bind an infant. And, 2dly, that a covenant to pay the wife an annuity of £600 a year, not out of particular lands, would not bind her: from this decree the cause went to the House of Lords. The first question on the point of law was put to the judges; the next question was, whether an equi-

table jointure would bind the infant. It was held that a jointure at law would bind, and that a covenant would be held equivalent in this court, though no particular lands were specified; because, it was said, it amounted to the same thing; for if there were no lands, it would be the same thing as if it was out of particular lands, and they were executed, then the wife would be entitled to her dower. So that she would have the jointure or the dower. In that case the settlement extended to settle her real estate, but there was no question or decision upon that. The House ordered a part of the personal estate to be set apart, to pay the annuity, but the widow would have had a right to have had the provision made in land, and the House of Lords would have ordered lands to be set out, if she had pressed it.

All the determination therefore in that case, is, that where the provision is made as effectual as if it was set out, it will be sufficient, though it is not so.

There was no question arose on that case, on the subject of election.

By the common law, upon the marriage, the wife acquires a right to dower in the freehold, and a customary share in the copyhold estates of the husband, or a provision from the husband under the Statute.

It is said, that guardians have a power to bind the right of the infant, but I think *Drury* v. *Drury* did not mean to decide that. If the provision had not been certain, or if she was only to take upon a remote contingency.

Before I perform an agreement, I must see that it is reasonable.

Then, what is a jointure? Lord Coke defines it: "It is a competent livelihood of freehold, for the wife, to take effect immediately after the death of the husband, for the life of the wife." *Vernon's Case*, 4 Rep. 2.

I wish to know, what fair conclusion can be drawn from *Drury* v. *Drury* that there is any equity by which a woman would be obliged to take an uncertain interest in bar of dower. Here, *non constat* that one of the estates will ever be hers in possession; the other has fallen in, if she chooses to take it.

Suppose she had had a jointure which turned out to be bad, I mean, which would not have afforded her the same advantage which she would have had from her dower, would that have bound her?

In *Drury* v. *Drury* she had as certain a provision as in her dower; therefore, I think *Drury* v. *Drury* decides, that where the provision is equally certain with the dower, it is good.

Would she have been bound by this in her husband's lifetime, whilst both the tenants for life were alive? If it is good at all, it must be so from the making of the settlement; but she could not be bound then.

Any equitable provision which a woman takes, must be as certain a provision as her dower, not an uncertain provision which she may never enjoy.

I do not say that if she had been adult, she might not have bound herself. She might have taken a provision out of the personal estate,

or she might even have taken a chance, in satisfaction for her dower, acting with her eyes open; but an infant is not bound by a precarious interest.

Lord Thurlow, in *Durnford* v. *Lane* [1 Bro. C. C. 106] and in *Williams* v. *Williams* [Id. 152], held, that a settlement to bind an infant must be reasonable. This is not such an agreement as a court of equity can call upon her to confirm. The guardian is incautious where he attempts to bind the infant by a precarious provision.

Declare her not bound by the settlements, and to be at liberty to make her election, to take the provisions made for her, or to take her dower and free bench, waiving the provisions; it being signified, that she consented to take the dower and free bench.

The eldest son, as he suffers by her taking her dower and free bench, must have amends made to him by the copyhold estate settled by Palling.

Referred it to the master, to take an account of the value of the freehold and copyhold estates, and reserved further directions till after the account taken.

Mr. Graham and *Mr. Stratford*, for the plaintiffs.

Mr. Lloyd and *Mr. Agar*, for the defendants.

DYKE *v.* RENDALL.

CHANCERY. 1852.

[*Reported* 2 *De G. M. & G.* 209.]

THE bill in the present suit was filed on the 6th July, 1848, by Elizabeth Dyke, the widow of Thomas Webb Dyke, against Charles Edward Rendall, for the recovery of dower out of certain freehold estates acquired by her husband during his coverture, and sold by him previously to his death to one Richard Cox, from whose devisees the defendant, Charles Edward Rendall, purchased the same, with full notice of the plaintiff's right. The bill stated that the defendant alleged that the plaintiff's right had been barred by a settlement executed on her marriage, and charged that so far as the settlement proceeded from the husband it had failed to be productive, inasmuch as the sums of £2000 and £500 secured in that settlement by the bond of her husband for the benefit of the plaintiff during her life, had not been paid.

It appeared by the answer and was proved by the evidence, that the plaintiff was twenty-eight years of age when she married Thomas W. Dyke, in the year 1810, and that upon the occasion of that marriage a settlement was executed, to which she was party by her then name of Elizabeth Skinner. The defendant submitted that the plaintiff's right

or title to dower was in equity well and effectually barred by the settlement.

By the decree made on the hearing of the cause by the Vice-Chancellor *Wigram*, on the 20th April, 1849, it was referred to the master to inquire whether any settlement had been made on the marriage of the plaintiff and her late husband, T. W. Dyke, and whether such settlement (if any) was actually productive of any benefits, and what was the amount of such benefit actually realized and received by the plaintiff.

The master found, among other things, that a settlement had been made on or prior to the marriage of the plaintiff. The settlement, which was fully set out in the report, was made between William Dyke of the first part, John Skinner of the second part, T. W. Dyke of the third part, Elizabeth Skinner of the fourth part, and the trustees therein named of the fifth part, and contained the following recitals: that in consideration of the intended marriage, and for providing a competent jointure and provision of maintenance for Elizabeth Skinner, in case she should, after the intended marriage, survive and outlive T. W. Dyke, and for securing a provision for their issue, William Dyke had paid to T. W. Dyke, at or before the ensealing and delivery thereof, the sum of £3000, the receipt of which T. W. Dyke did thereby acknowledge, and that John Skinner had paid to T. W. Dyke the sum of £851 10*s.*, the receipt of which T. W. Dyke did also thereby acknowledge, and J. Skinner had agreed to enter into the covenant thereinafter contained for securing the payment of the further sum of £500 of like lawful money to T. W. Dyke, upon the death of him, J. Skinner, which said sums of £851 10*s.* and £500 were intended as the marriage portion of Elizabeth Skinner; and that it had been agreed by and between the parties thereto, that T. W. Dyke should give his bond to the trustees conditioned for the payment of the sum of £2000, with interest, at or after the rate of £5 for £100 for a year, within six months from the solemnization of the intended marriage, upon the several trusts thereinafter mentioned and declared, and that T. W. Dyke, by his bond or obligation bearing even date therewith, was become bound unto the trustees accordingly: and it was thereby witnessed and agreed that the interest of the £2000 was to be for T. W. Dyke for his life, and after his decease for the plaintiff for her life, with limitations over after the death of the survivor, on certain trusts in favor of their issue, and on failure of issue: and it was also witnessed that in consideration of the intended marriage, John Skinner covenanted to pay £500 to T. W. Dyke within six months after the decease of the said J. Skinner, on condition that T. W. Dyke should give a bond to secure the like sum.

The master also found that J. Skinner had died, and that the sum of £984 18*s.*, which included arrears of interest, had been received by the trustees of the settlement in respect of the £500 so agreed to be paid by J. Skinner, and that it had been subsequently arranged be-

tween T. W. Dyke and the plaintiff and their children, that the sum of £484 18*s.* should be secured on the trusts of the settlement in part liquidation of the sum of £2000 so agreed to be paid by T. W. Dyke, but which he was unable to pay; and the master found that the benefits settled or assured to or in trust for the plaintiff, of which the settlement was actually productive, consisted of the sums of £500 and £484 18*s.*, and that the interest in respect of which had been received by the plaintiff, and that there was £305 6*s.* arrears of interest due on the £1515 2*s.* residue of the £2000, the unpaid residue of the bond debt for £2000.

On the hearing of the cause, on further directions, by the Vice-Chancellor *Knight Bruce*, on the 21st July, 1851, his Honor considered that he was bound by the authority of *Walker* v. *Walker*, 1 Ves. 54, to hold that the plaintiff's claim to dower was barred by the recital in the settlement, but he decided that the plaintiff had a lien on the estates which had been acquired and sold by her husband during the coverture for so much of the £2000 as had not been received by her, and expressed his opinion that if the lien was not exactly the same as that of a vendor of an estate for his unpaid purchase-money, yet that it was analogous to it. It was accordingly by the decree declared that the plaintiff was entitled in respect of her dower to one-third of the receipts and profits of the estate in question, not exceeding for such one-third the sum of £60 12*s.* per annum, being the interest at £4 per cent., which would have accrued due on £1515 2*s.* remaining unpaid under the bond, and that she was entitled to such interest from the time when the purchaser entered into possession of the estate. From this decree the defendant now appealed to the Lord Chancellor.

Mr. Greene and *Mr. Vance*, for the plaintiff.

Mr. Malins and *Mr. Bird*, in support of the appeal.

July 24. — The Lord Chancellor. [Lord St. Leonards.] In the case of *Vizard* v. *Longdale*, cited in *Tinney* v. *Tinney*, 3 Atk. 8; s. c. Kelynge, 17, there was no statement that the provision was intended for the jointure of the wife, whereas in the present case there is an express recital that the sums paid and to be secured were for a "competent jointure and provision of maintenance." I think it very clear, therefore, that the words used in the settlement before me are in themselves sufficient to operate in this court in bar of dower; but whether in the events which have happened they ought to be so construed is a different question. This is a peculiar contract, and, before giving my judgment upon it, I shall again look at Sir A. Hart's decision in *Power* v. *Sheil*, 1 Moll. 296. I confess, however, that I do not understand the observations attributed to him, to the effect that an adult female cannot in equity contract herself absolutely out of dower. In my opinion there can be no doubt whatever of her right so to contract previously to her marriage, and to bar herself of all dower or thirds that may accrue to her from her husband's estate; if that is so, the question is, what has the plaintiff here contracted for. The settlement

is certainly of a singular shape; the fathers of the husband and of the wife are parties, and the husband provides no money. [His Lordship here read the recitals and proceeded:] I apprehend that the true consideration for the bar of the plaintiff's dower was the actual payment of £3000 by the father of the husband, whereby he may be considered as saying, "I intend that my son's estate shall not be encumbered with dower; I will make such a provision for him as will enable him to make a competent provision for his wife." I am very much inclined to think that the moment the money was paid by the husband's father the condition for the release of dower was complied with, and that this lady could not afterwards claim her dower; but if that were not so, the next question which arises is as to whether it was intended that the bond should be accepted as a satisfaction of dower. If no reliance was intended to be placed on the bond, why was it taken, or why was not the husband prevented from appropriating the money paid by his father? It is also to be observed that at the time of the marriage the husband had no estate on which dower could have attached, and at that time the wife had not even an inchoate title. On these grounds, therefore, it appears to me that she has chosen her remedy and accepted a security, and I see nothing in any of the authorities to alter the view of the case I now entertain, and as at present advised I do not think that the plaintiff has any right, on the failure of the bond, to go against the estate subsequently purchased, but I will not part with this case without further consideration.

July 27. — The Lord Chancellor. In this case I concur with the Vice-Chancellor in thinking that the settlement must be taken in bar of dower. There is, however, another question of a very different nature; namely, whether the plaintiff is entitled to any lien on the lands which were bought and sold by her husband during the coverture.

To determine this we must consider the difference in point of law between a legal and an equitable bar of dower. *Vernon's Case*, 4 Rep. 1 a, explains how the Statute of Uses applied to dower. A great portion of the lands of this country, being vested in feoffees to uses, were exempt from dower, but the Statute having converted uses into a legal estate, the consequence was that the lands became subject to dower. The Statute, however, provided against the wife being entitled both by settlement and under uses, and having gone so far, proceeded to enact that if the widow should be evicted from her legal jointure she should be remitted to her dower; thus where the clause of eviction applies, it operates on the legal jointure which made the bar under the Statute. The Statute creates the bar, and creates also an exception, and the clause of eviction never can operate except when the bar is created by the Statute. Let us now see how this applies to equity. It was soon settled that what was not a legal bar might be made an equitable bar, the ground of this equitable bar being contract: this did not proceed on any analogy to the legal bar. As to the authorities, there

are very few. The rule of the court is, I think, correctly stated by Lord Alvanly in *Caruthers* v. *Caruthers*, 4 Bro. C. C. 500, that an adult female may take anything in bar of dower, that she may take a provision out of the personal estate, or "even a chance in satisfaction for her dower, acting with her eyes open." This court disregards the nature of the property and the *quantum*, and therefore an equitable bar has none of those qualities which attach to a legal bar; it is on contract only, as laid down by Lord Redesdale, in the case of *Birmingham* v. *Kirwan*, 2 Sch. & Lef. 444, where his Lordship observes: "The principle, then, that the wife cannot have both dower and what is given in lieu of dower being acknowledged at law as well as in equity, the only question in such cases must be, whether the provision alleged to have been given in satisfaction of dower was so given or not; if the provision results from contract, the question will be simply whether that was part of the contract."

In *Simpson* v. *Gutteridge*, 1 Madd. 609, Sir Thomas Plumer thought that the doctrine there broached, that a married man could not make a valid conveyance without a fine unless there was an outstanding term, could not be sustained, and that the practice of conveyancers was uniformly against requiring an inspection of the title-deeds of an estate settled in lieu of dower. If the present were a jointure operating as a bar under the Statute of Uses, the case would have been governed by the seventh section of that Statute; but in equity the bar rests solely on contract, and my opinion is that in this court, if a woman, being of age, accepts a particular something in satisfaction of dower, she must take it with all its faults, and must look at the contract alone, and cannot in case of eviction come against any one in possession of the lands, on which otherwise her dower might have attached; this has nothing to do with the performance of covenants and the like.

The question, then, is, Did this lady or not accept the settlement in bar of dower? [His Lordship here recapitulated the facts of the case, and added:] My conclusion is, that the plaintiff has accepted in lieu of dower payment of money at least, and that she is also concluded by the acceptance of the bond, and, although the bond was not satisfied, that she has no right to resort to the lands of her husband, bought after, and sold during, the marriage. The defendant, the purchaser, having naturally asked for the production of the settlement, on its being produced had, I think, good reason to be satisfied that the plaintiff was not entitled to dower upon the land.

The decree of the Vice-Chancellor must therefore be varied, and the bill must be dismissed, but without costs, as the plaintiff has relied on the authority of *Power* v. *Sheil*, 1 Moll. 296.

SECTION VI.

DOWER IN EQUITY OF REDEMPTION.

A. *Right to Redeem.*

MILLS *v.* VAN VOORHIES.

NEW YORK COURT OF APPEALS. 1859.

[*Reported* 20 *N. Y.* 412.]

APPEAL from the Supreme Court. Action for the specific performance on a contract made in July, 1851, for the conveyance by the defendant to the plaintiff of fifty acres of land, now within the city of Brooklyn. The defendant was to give a deed with full covenants, conveying a perfect title. He tendered a deed good in form in November, 1851. The plaintiff objected to the title on this ground: The defendant had, in 1835, conveyed a portion of the land to one Hans Learned, receiving from him a contemporaneous mortgage to secure the purchase-money, in which his wife (if he had one) did not join. Learned conveyed portions of the land thus granted to him to Gilman, Marston, Tripp, Lloyd, and Smith, each of whom had a wife. Learned's mortgage was foreclosed by suit in chancery, to which his grantees were parties; but their wives, who were then living and who continued in life at the hearing of this suit, were not parties. The defendant had re-possessed himself of the title by purchase under this foreclosure: the master's deed to him bearing date July 8th, 1840. The plaintiff objected to the title, that the wives of Learned and his grantees were not barred of their contingent equities of redemption. The defendant insisted that this constituted no defect in the title. Various propositions were made with a view to overcome the difficulty; among others, that a new foreclosure of the Learned mortgage should be instituted: but the parties failed to agree in regard to it. The plaintiff requested the defendant to convey to him that portion of the premises to which his objection did not apply, he paying and securing in the manner stipulated by their contract a proportionate part of the price agreed to be paid for the whole. The defendant refused to accede to this proposition. The matter was under negotiation until April, 1852. This suit was commenced in July following. The complaint insisted that the title was defective, but prayed that the defendant be required to make it perfect.

The trial was before a referee, who held that the plaintiff's objections to the title were unfounded, but that by refusing to take a good title when tendered to him, and by refusing fair offers to indemnify him against the alleged defect, and by the lapse of time, he had lost the

right to a specific performance; and he ordered a judgment denying a specific performance, but awarding restitution to the plaintiff of the money which he had paid towards the purchase of the land, with interest. Upon appeal the Supreme Court, at General Term in the second district, held the plaintiff's objection to the title well founded, but it affirmed the judgment entered on the referee's report, upon the ground that the defendant could not give a perfect title; though he might bring a suit to foreclose the wives of Learned and his grantees, he could not prevent them from redeeming if they saw fit; the plaintiff did not ask for such a title as the defendant could give, and the most he was entitled to was the relief awarded by the referee. The plaintiff appealed to this court.

J. L. S. Cummins, for the appellant.

John K. Porter, for the respondent.

SELDEN, J. It would not necessarily follow, even if all the objections originally taken by the plaintiff to the title of the defendant were unfounded, that a specific performance of the contract must be decreed. As, however, there is nothing in the case to impeach the good faith of the plaintiff, nor anything shown on the part of the defendant which would make it inequitable to compel a performance, it would seem that a court of equity, in the exercise of a sound discretion, would be called upon, if there is no defect in the title, to require the defendant to perform. The only objection not obviated by the proof given at the hearing, was that based upon the omission to make the widow of one person and the wives of others, interested in the premises as grantees of the mortgagor, parties to the suit to foreclose the mortgage given by Hans Learned to the defendant. This was the only objection considered by the referee, or by the Supreme Court, and the only one which it is necessary to consider here.

The case does not show very clearly whether Learned, the mortgagor, had a wife; or if he had, whether she was made a party to the suit or not. But the mortgage having been given for purchase-money, both the referee and the Supreme Court have assumed that the question whether it was necessary to make the wives of the grantees of the mortgagor parties, in order to cut off their equitable rights, is identical with the one whether it was necessary, if the mortgagor had a wife, to make her a party for that purpose. This assumption is no doubt correct to this extent, viz.: That if the dower rights of the wife of the mortgagor in the equity of redemption were such as to require that she should be made a party to the foreclosure, then for the same reason it would be necessary to make the wives of the grantees of that equity parties. The converse of the proposition, however, may not be, and I think is not, true. If it be unnecessary in such cases to make the wife of the mortgagor a party, it is because the Statute concerning mortgages for purchase-money has made it so. This Statute, however, does not extend to the wives of the grantees of such mortgagor, and can in no way affect their rights.

But as the conclusion to which I have arrived, as to the necessity of making the wife of the mortgagor himself a party, is decisive of this branch of the case, I will consider the question in the aspect in which it was considered by the court below. Is it necessary then in foreclosing a purchase-money mortgage, to make the wife of the mortgagor a party, in order to cut off her rights in the equity of redemption? 1. Would it be necessary, independent of the Statute? 2. If so, does the Statute render it unnecessary? Whether at common law it would be necessary to make her a party, must depend upon the question whether she has any interest, either legal or equitable, complete or inchoate, in the mortgaged premises. If she has such an interest, however remote, then upon the plainest and most familiar principles, that interest cannot be affected, unless by virtue of some Statute, by a suit in equity to which she is not a party. This is not only well settled by authority, but results from the simplest and most obvious principles of justice. The doctrine has been frequently applied to the inchoate rights of dower of a married woman. It was so applied in the case of *Wilkinson* v. *Parish*, 3 Paige, 653, where it was held that the purchaser of premises sold under a decree for partition, takes the same subject to the right of dower of the wife of one of the tenants in common, unless the wife was a party to the suit.

It is entirely clear, therefore, that if the wife of one who owns real estate subject to a mortgage given for purchase-money, has any inchoate dower rights at all, in respect to such property, these rights, unless by virtue of the Statute, could not be affected by a foreclosure suit to which she is not made a party; and a purchaser under such a foreclosure would not obtain an unencumbered title. That she has rights of this description, under the principles uniformly applied to mortgages in this country, is, I think, too clear to be denied. It having been, for the last half century, the settled doctrine in this State that the mortgagor, notwithstanding the form of the instrument, is to be regarded as the real owner of the property, and the mortgagee, until he obtains possession, as having only a lien or charge upon it, the courts were bound in consistency to hold, as they have repeatedly held, that the dower rights of widows extend to equities of redemption. This has never been doubted since the days of *Hitchcock* v. *Harrington*, 6 John. 290, and *Collins* v. *Torry*, 7 John. 278. The same doctrines prevail in some if not all the other States. *Fish* v. *Fish*, 1 Conn. 559; *Snow* v. *Stevens*, 15 Mass. R. 279; *Gibson* v. *Crehore*, 3 Pick. 475.

That a mortgagor, who has purchased land and given back a mortgage for the whole or a part of the purchase-money, is the owner of an equity of redemption in the premises so purchased, will not be disputed; and there is not the slightest legal difference between this equity, so far as he is concerned, and one where the mortgage was given for borrowed money. His rights in the property are in all respects the same, and the same proceedings are necessary to foreclose them. If, therefore, he is to be regarded as the real beneficial owner of the property in the one

case, he is in the other; and it would seem plainly to follow, that if his widow is entitled to be endowed of this equity in the one case, she must be equally so in the other.

There is nothing in the case of *Stow* v. *Tifft*, 15 John. 458, which conflicts with this conclusion, even if the doctrine of that case could be sustained. When a married man, owning unencumbered real estate, executes a mortgage upon it, in which his wife does not join, as her inchoate interest in the property precedes that of the mortgagee, it seems perfectly just that her right, if not released, should be paramount to his. But where the purchase-money has never been paid, and the mortgage is given for that, there is an apparent injustice in permitting the rights of the wife to prevail over the prior rights of the vendor; and it was to avoid this result that the late Supreme Court adopted the somewhat peculiar doctrine of the case of *Stow* v. *Tifft*.

It had been said in several old English cases that where the seisure of the husband was instantaneous only, as when the title was transferred to and from him at the same instant and by the same act, there no right of dower would attach, and it was upon the doctrine of these cases that the Supreme Court rested its decision in the case of *Stow* v. *Tifft*. On looking carefully into those old cases, however, it appears that in none of them was the conveyance intended to vest any beneficial interest in the husband; the object being in every case merely to transfer the title to, or perfect the title in, some other person. These cases, therefore, would seem scarcely to afford any solid foundation for that of *Stow* v. *Tifft*.

But that case, assuming it to have been rightly decided, has no bearing upon the point presented here. The question there was, not whether the widow was entitled to dower in the equity of redemption, subject to the lien of the mortgage, but whether her right of dower was paramount to the rights of the mortgagee; and whether she could recover her dower in opposition to the mortgage, and without offering to redeem it. There is nothing in the case of *Stow* v. *Tifft*, or any other well considered case, nor in reason, to show that the wife or widow of one who has given a mortgage for purchase-money, whether she has or has not joined in the mortgage, is not as much entitled to be endowed of the equity of redemption, that is of the interest justly and beneficially vested in her husband, as the wife of any other mortgagor. The only effect of the decision in *Stow* v. *Tifft* was to place the wife of one who had during coverture given a mortgage for purchase-money, in which she had not joined, substantially in the same position as if the mortgage had been given for purchase-money or any other indebtedness, before coverture, or as if she had joined in a mortgage for such indebtedness after coverture. A *feme covert*, who executes a mortgage jointly with her husband, is nevertheless entitled to dower in the equity of redemption, of which her husband is seised notwithstanding the mortgage; and this right, as we have seen, is not affected by a foreclosure in equity unless she is made a party. If omitted, she can come in at any time afterward

and redeem, notwithstanding a decree and sale in the foreclosure suit. It is the same under the decision in *Stow* v. *Tifft,* in case of a purchase-money mortgage; although the wife may not have joined in such mortgage. At common law, therefore, aside from our Statute on the subject, it is plain that a wife or widow, in such a case, must be made a party to a foreclosure suit, or her right to redeem the premises from the lien of the mortgage will remain unaffected.

Does the Statute in question prescribe a different rule? Its language is this: "When a husband shall purchase lands during coverture, and shall at the same time mortgage his estate in such lands to secure the payment of the purchase-money, his widow shall not be entitled to dower out of such lands, as against the mortgagee and those claiming under him, *although she shall not have united in such mortgage*, but she shall be entitled to her dower as against all other persons." 1 R. S. 741, § 5. It is manifest on the face of this provision, without the express declaration to that effect contained in the Reviser's Notes, that its design was simply to confirm, by positive enactment, the rule adopted in the case of *Stow* v. *Tifft*, *supra.* The sole motive for that decision was, as we have seen, not to interfere with the widow's claim of dower in the equity of redemption, but to prevent that claim from having a preference over the mortgage when given for purchase-money. The motive for the enactment was precisely the same: and the reason upon which both the decision and the Statute were founded goes obviously no further. Care seems to have been taken in framing the Statute thus to limit its effect. The words "although she shall not have united in such mortgage," plainly import a design to make the position of the widow, as to a mortgage for purchase-money not signed by her, the same as in respect to any other mortgage which she had signed.

But it is said that the Statute goes further than this, and denies to the widow all right to dower as against the mortgagee, and any person claiming under him. Hence, as every person deriving title under the foreclosure may be said to claim under the mortgagee, it is insisted that all claim to dower on the part of the widow, not only in the land at large, but in the equity of redemption, is cut off by such foreclosure, whether she is made a party or not.

The objection to this construction is, that it is inconsistent with the reason upon which the Statute was founded, as gathered from the history of the law on the subject, as well as from the express declaration of the revisers; and inconsistent also with the object and intent of the Statute, as plainly evinced by its phraseology in other respects. Parties obtaining title under the foreclosure, claim not only under the mortgagee, but under the mortgagor also. They obtain the rights of both. So far as they claim under the mortgagee alone, they are protected by the Statute against the widow, without her having been made a party. In that portion of the estate she has no interest. But in respect to the portion which, under the foreclosure, is obtained from the mortgagor,

viz., the equity of redemption, in which she has an interest, her rights are not affected unless made a party.

This construction makes the whole law on the subject reasonable and consistent; while any other would produce manifest incongruity and injustice.

These views accord with and are sustained by those expressed by both the vice-chancellor and chancellor in the case of *Bell* v. *The Mayor of New York*, 10 Paige, 50, so far as that case involved the questions presented here. In that case, the foreclosure was not completed until after the death of the mortgagor; and hence, it did not become necessary to determine the effect of a foreclosure, in his lifetime. There is not the slightest reason, however, for giving to such a foreclosure any greater effect in cutting off the dower rights of the wife of the mortgagor, than to one which takes place after his death. The inchoate rights of the wife are as much entitled to protection as the vested rights of the widow. Neither can be impaired by any judicial proceeding to which she is not made a party.

If this reasoning is sound, it follows, that it was absolutely necessary to make the wives of the grantees of Learned parties to the foreclosure suit, in order to cut off their inchoate rights of dower. The wives of the grantees of a mortgagor have the same rights of dower in the equity of redemption, as the wife of the mortgagor himself. The cases of *Collins* v. *Torry*, 7 Johns. 278, and *Snow* v. *Stevens*, 15 Mass. 279, are both cases of this description. The plaintiff in each was the widow, not of the mortgagor himself, but of a grantee of such mortgagor; and in each, she was held entitled to dower in the equity of redemption. These are leading cases in the respective States, and have been repeatedly ratified and approved by the courts of both.

The necessity of making the wives of the grantees of Learned parties, therefore, in order to foreclose their rights, is clear. The defendant, therefore, has not a perfect title, nor would a foreclosure of the Learned mortgage necessarily give him such a title; as the grantees' wives, not made parties to the first foreclosure, would have a right to come in and redeem. The plaintiff cannot, therefore, have a judgment or decree for a complete performance.

But he insists, that if he has not made a case for a full and complete performance, he is nevertheless entitled to a judgment, that the defendant convey such title as he has, with compensation for the defects, and he asks for such a judgment.

It is quite clear, that this is not a case for compensation. It would obviously be entirely impracticable to arrive at any reasonably accurate estimate of the defects in the defendant's title, or to ascertain what sum would be an adequate compensation for them; depending as they do, upon the deaths of a number of individuals; upon the survivorship of their respective wives; upon the time when, if ever, their rights of dower shall accrue, and many other contingencies, too uncertain to be capable of even a proximate estimation. Again, the contract requires

the defendant to give a deed with covenants; and it would be necessary to modify these covenants, so as to exempt the defendant from liability for any failure of title, growing out of the defects compensated for; which would still further complicate the case. For these and other similar reasons, which might be suggested, no judgment for compensation could, with propriety, have been given by the court below, even if the plaintiff had asked for such a judgment upon the trial, and had furnished the court, so far as practicable, with the necessary facts upon which to predicate it.

The plaintiff, however, further asks, if the opinion of the court should be against him upon the two points already considered, that the defendant be required to convey that portion of the premises to which he has a perfect title; and offers to accept of such a conveyance.

The Court of Chancery in England has frequently exercised the power here sought to be invoked, and our courts have in some instances followed their example. But it is obvious that in this country, where the value of real estate is so fluctuating, changing, not unfrequently, from day to day, the practice of making such decrees, if generally adopted, would give to the purchasers of such property great advantages over their vendors. By availing themselves, as in this case, of some defect in the title to a portion of the premises, they might keep the matter in abeyance perhaps for years, secure against loss, in case of a fall, but ready to avail themselves of any rise in the value of the property. Although, therefore, the power of making such decrees no doubt exists, it should, in this country at least, be exercised with great deliberation and caution.

In the present case, however, I feel bound to say that I see nothing in the facts developed which throws the least suspicion upon the fairness and good faith of the plaintiff; and I should feel strongly disposed to grant him the relief sought in this last request, if it could be properly given in the present position of the case. It is of no consequence that no such offer is made or relief asked in the complaint. But the difficulty is, that no such ground was taken or suggestion made at the trial. Very many circumstances might exist, which would make it highly inequitable to make such a decree. The relative value of the different portions of the property may have entirely changed. The delay may have wrought inevitable changes, in the relation of the whole or of parts of the premises, to the defendant's other property. Valuable improvements may have been made under circumstances which would justify them. The defendant was clearly entitled to an opportunity to prove any circumstances of this nature, which might have existed; and as no such decree could be made unless asked for by the plaintiff, the defendant was not called upon to offer the proof, unless such a request was made. It is plain that no such decree can be made, without giving to the defendant an opportunity to adduce proof on this subject. What the plaintiff asks, therefore, is, in substance, that the judgment be reversed to enable him to make this additional offer and claim, notwith-

standing no error was committed by the referee in disposing of the case as it was presented before him.

These views, in which JUDGES ALLEN and GRAY concur, would lead to an affirmance of the judgment. But one of my associates, JUDGE STRONG, is of the opinion that it was unnecessary to make the wives, either of Learned himself or of his grantees, parties to the foreclosure, and is in favor of reversing the judgment for that reason. The other four, viz.: JOHNSON, C. J., and COMSTOCK, DENIO, and GROVER, JJ., while they concur in holding that the wife of Learned, if he had a wife, and the wives of his grantees, should have been made parties, in order to cut off their rights in the equity of redemption, and that the title of the defendant is defective in consequence of the omission to make them so, nevertheless think, inasmuch as the referee decided that the defendant had a perfect title, and that the plaintiff was in fault for not having accepted the deed when tendered, that the case has never been fully considered in its other aspects; and that there ought to be a new trial, to give the parties an opportunity to present the facts and equitable considerations bearing upon the plaintiff's claim to partial relief, and to have the same deliberately passed upon by the Supreme Court.

The judgment, therefore, must be reversed, and there must be a new trial, with costs to abide the event.

Ordered accordingly.[1]

DAVIS *v.* WETHERELL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1866.

[*Reported* 13 *Allen*, 60.]

BILL IN EQUITY to redeem land from a mortgage. The bill set forth that Samuel Davis, on the 1st of April, 1854, made a mortgage, in which his wife joined, of a tract of land in Worcester, to secure the payment of six thousand dollars; that the mortgage was assigned to the defendant Wetherell on the 27th of June, 1860; that Davis became an insolvent debtor June 5th, 1861; and on the 29th of May, 1862, his assignees conveyed to Wetherell the equity of redemption in the premises; that May 1st, 1863, the mortgage debt being due, Wetherell entered for the purpose of foreclosing his mortgage, and recorded a certificate of his entry; that November 1st, 1864, Wetherell conveyed to the other defendant, Anna D. Anthony, by a quitclaim deed, all his interest in the premises; that the defendants have both been in possession, taking the rents and profits; that the premises were a part of the homestead farm of Davis, though separated by

[1] But see *Pitts* v. *Aldrich*, 11 Allen 39 (1865).

lands of other persons from that portion of the farm upon which his dwelling-house and barn were situated, and were half a mile distant therefrom, and were bought by Davis after the purchase of the rest of the farm, but were used and cultivated by him in connection with the rest of the farm, partly for mowing and partly for pasturing his farm cattle; that Davis acquired a homestead in the premises under the provisions of Statute 1855, *c.* 238, and was entitled to have the same set off to him, as against all persons except the mortgagees; and that Selina E. Davis, his wife, would be entitled, in case she should survive her husband, to have dower assigned her in the premises, except as against the mortgagees.

The defendants demurred, and at the argument relied on the following causes of demurrer: "1. Because the plaintiffs are not entitled to any homestead. 2. Because the husband is not entitled to any homestead. 3. Because the wife is not entitled to maintain a bill for her dower or homestead in the lifetime of her husband, either with or without her husband, under the circumstances stated in the bill."

The case was reserved by *Gray*, J., for the determination of the full court.

P. C. Bacon, for the defendants.

T. L. Nelson, for the plaintiffs.

HOAR, J. The questions presented for decision upon the argument of the demurrer are only these: 1. Whether the husband, Samuel Davis, is entitled to maintain a bill to redeem, by reason of a homestead estate in the equity of redemption under Statute 1855, *c.* 238; and 2. Whether his wife, who joins in the bill, is entitled to redeem by virtue of her inchoate right of dower in the equity, she having joined with her husband in executing the mortgage?

Upon the first question, the court are of opinion that the rights of the parties cannot be conclusively settled upon demurrer. The bill contains the distinct averment that the parcel of land described in the mortgage is a part of the farm occupied and used as a residence by the said Davis, as a householder with a family, and that he was entitled to a homestead in the equity of redemption thereof. As a matter of pleading, the allegation seems to be sufficient. Whether upon the proofs the allegation will be sustained, or whether the case will fall within the rule adopted in *Adams* v. *Jenkins*, 16 Gray, 146, we cannot now determine.

The other question is new and interesting, and nothing has been found in the way of direct authority which bears upon it. That a widow is dowable of an equity of redemption is well settled; indeed, is especially provided by Statute. Gen. Sts. *c.* 90, § 2. But no adjudged case has been found in which a wife having an inchoate right of dower has been allowed to redeem from a mortgage in which she had joined with her husband. Before the Revised Statutes, it would seem that if the mortgagee or his assigns had purchased the husband's equity of redemption, he could not cut off the wife's right

of dower in the equity by a foreclosure until after the husband's death. *Lund* v. *Woods*, 11 Met. 566. But since the Revised Statutes it has been repeatedly determined that the foreclosure, in the mode provided by Statute, of a mortgage in which the wife had joined to release her dower, or in case the husband had only been seised of an equity of redemption during the coverture, would bar the right of dower. And in a suit against the husband to foreclose, the wife need not be made a party. *Wedge* v. *Moore*, 6 Cush. 8. *Savage* v. *Hall*, 12 Gray, 363. *Farwell* v. *Cotting*, 8 Allen, 211. *Pitts* v. *Aldrich*, 11 Allen, 39.

Upon general principles of equity, it is difficult to find a reason why an inchoate right of dower should not be protected against extinguishment by the foreclosure of a mortgage; especially where the husband has parted with his whole estate in the land, and can no longer be regarded as, in any sense, representing the interests of the wife. Coverture is no bar to the maintenance of a suit in equity; and it is the policy of our legislation to permit married women to assert, protect, and sue for their separate rights of property. By Gen. Sts. *c.* 140, § 13, the right of redeeming a mortgage is given to "the mortgagor, or any person lawfully claiming or holding under him." A woman entitled to an inchoate right of dower cannot be regarded as "holding" under her husband, as she certainly has no estate in possession. But she may well enough be considered as "claiming" under him. When her dower is assigned, her estate is a continuance of her husband's. Her inchoate right of dower is a right of a very peculiar nature. It is a right of which nothing but her death or voluntary act can deprive her, and so it is something more than a mere possibility. Ordinary Statutes of Limitation do not run against it, so that adverse possession as against her husband will not deprive her of it. And although she cannot convey or alienate it, except by joining in a deed with her husband to release it, and cannot protect it from waste, and it is not liable to be taken by legal process, yet her husband cannot bar or encumber it. As was said by Chief Justice Parker in *Bullard* v. *Briggs*, 7 Pick. 533, it is "a valuable interest, which is frequently the subject of contract and bargain." "It is more than a possibility, and may well be denominated a contingent interest." In that case it was held that where a wife joined with her husband in releasing her dower to a mortgagee, and the husband, in consideration of such release, conveyed the equity of redemption to a trustee for her benefit, the conveyance could not be avoided by his creditors, if the value of the dower was equal to that of the equity conveyed.

In *Bacon* v. *Bowdoin*, 22 Pick. 401, it was decided that a tenant for years, or even the owner of a mere easement in land, might bring a bill to redeem a mortgage. And we think it could not be doubted that the owner of a life estate in remainder, or other contingent estate, might redeem. After the death of the husband, and before assignment of dower, the widow has no estate which she can enter upon or convey; yet undoubtedly she has an interest sufficient to support a suit for

redemption. *Eaton* v. *Simonds*, 14 Pick. 98. *Farwell* v. *Cotting*, 8 Allen, 211.

In *Burns* v. *Lynde*, 6 Allen, 305, a wife having an inchoate right of dower was allowed to maintain a suit in equity to set aside a deed purporting to release her dower, which had been executed by her in blank and afterwards filled up; and a decree was made for a reconveyance to her of the right of dower by the grantee in the deed. That case goes very far in principle to sustain the conclusion to which we have come in the case at bar.

And we are all of opinion that the female plaintiff, having a valuable interest in the mortgaged premises, in privity with the mortgagor, an interest which she might have released to the assignee of the equity of redemption for a pecuniary consideration perhaps of considerable amount, and of which she would be deprived by a foreclosure of the mortgage, is entitled to maintain her bill.

For the reasons stated in *Brown* v. *Lapham*, 3 Cush. 551, we think there was no merger of the equitable in the legal title, and that the defendant may have the full benefit of the assignment of the mortgage.

If she shall elect to receive the whole amount due on the mortgage, preferring the surrender of her equity of redemption to contribution, she may do so; and Mrs. Davis, on payment of that sum, will hold a valid title as assignee of the mortgage. If a question as to the proportion in which the respective interests are to contribute shall hereafter arise, some mode by which their proportionate value can be ascertained must then be adopted. It does not arise upon the demurrer.

Demurrer overruled.

VREELAND *v.* JACOBUS.

COURT OF CHANCERY OF NEW JERSEY. 1868.

[*Reported* 19 *N. J. Eq.* 231.]

On petition of Susan E. Jacobus, for surplus moneys.

Mr. McDonald, for petitioner.

THE CHANCELLOR. [HON. ABRAHAM O. ZABRISKIE.] In this case, mortgaged premises were sold by an execution in a foreclosure suit, in which Vreeland was complainant, and Abraham J. Jacobus, and his wife, the petitioner, were defendants. The *fieri facias* was issued August 28th, 1867. The bill was filed April 24th of that year, and the sale under the writ was after December fourth. The sale produced about $2700 above the mortgage debt and costs, which is paid into court.

The petitioner had filed a bill against her husband for a separation and alimony, and on the 18th day of June, 1867, obtained a decree in this

court for a divorce *a mensa et thoro*, which directed that her husband should pay her $312 a year, in equal quarter-yearly payments, from the date of the decree, and within thirty days after service of a copy of the decree should give security for the payment, and that the decree should, from its date, be a lien upon his real and personal estate; it also directed the husband to pay to her $50 for counsel fees, and her costs to be taxed, and that she have execution therefor. This decree was served upon Jacobus on the 20th day of July, 1867. He failed to comply with it, and to give the security required, and on the 4th of December following, a writ of sequestration was sued out and levied upon his equity of redemption in the mortgaged lands. On the 18th of November, a judgment was entered by confession against Abraham J. Jacobus, in favor of his father James A. Jacobus, in the Circuit Court for the county of Essex, in which the mortgaged lands lie; this judgment was for $2080.20; and on the same day an execution was issued and levied on them.

The complainant claims a right in the surplus moneys; first, by virtue of her inchoate right of dower in the equity of redemption, of the sale of which the surplus is the proceeds. She has such right, beyond question, and the court will see that she is protected in it, but she will not be entitled to any payment by virtue of it during the life of her husband. She will have the right to have one-third of the money invested, and the interest paid to her after her husband's death; in his life it must go to him, or to such creditors or encumbrancers as may have a legal claim.[1]

B. *Contribution and Exoneration.*

WOODS *v.* WALLACE.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1854.

[*Reported* 10 *Fost.* 384.]

BILL IN EQUITY. The bill alleged that the plaintiff was the widow of Aaron Woods, late of Nashville; that during the coverture said Aaron was seised of the premises in which the plaintiff claims dower in this bill. It is further alleged that on the 7th day of December, 1849, while so seised, the said Aaron conveyed the premises in mortgage to one Z. Shattuck, to secure the payment of the promissory note of said Aaron to said Shattuck, which mortgage was in no wise signed by the plaintiff, and, moreover, the note thus secured has never been paid. The bill further alleged a mortgage made by said Aaron to

[1] The rest of the case, relating to the question of alimony, is omitted. The alimony was postponed to the claim of the judgment-creditor.

See next case.

Benjamin M. Farley, Esq., to secure the payment of a promissory note for $500 from said Aaron to said Farley, and the plaintiff signed said deed, and thereby relinquished her right of dower in the premises, as against the last-named mortgagee.

It alleged, also, that the defendant purchased and took an assignment of the Farley mortgage.

The bill further averred the death of said Aaron Woods, and also a sale by A. W. Sawyer, his administrator, of all his right in equity of redeeming the mortgaged premises, to the defendant. The seisin of the husband during coverture, the execution of the mortgage to Shattuck, and also of the Farley mortgage, and the assignment of them to the defendant, as well as the sale of the equity of redemption to the defendant, were admitted by the answer, and are not facts in controversy between the parties.

The complainant furthermore averred an offer to pay the defendant her fair proportion of the amount of the Farley mortgage, and prayed that her dower might be adjudged and duly assigned to her in the premises.

Farley, for the plaintiff.

A. W. Sawyer, for the defendant.

Woods, J. Upon this state of facts alleged and admitted, the mortgage to Shattuck can furnish no answer to the claim of dower made by the plaintiff. It was simply a deed of mortgage, made by the husband alone, during the coverture, and could not affect the plaintiff's rights. The husband can no more encumber or defeat the right of dower of the wife by a mortgage, in this State, than he can convey it by an absolute deed. It is familiar law in this State that the husband's conveyance will in no wise affect his wife's right of dower. It can only be done by her own act. Indeed, we are not aware that it is claimed that he can affect or defeat her estate by his individual conveyance. The Shattuck mortgage, then, may be laid out of the case. The mortgage deed to Farley was signed by the plaintiff as well as her husband, and her claim of dower in the premises thereby relinquished, as against the grantee in that deed, his heirs and assigns. Is the plaintiff entitled to dower in the premises, and if so, is she entitled to the extent of the use of one third of the premises, upon making contribution in the manner proposed in the bill? These are the questions arising upon the bill and answer. The claim of dower made in this case does not rest upon the mere right in equity of redemption of the husband. It is, however, well settled that a widow is dowable of an equity of redemption. To be sure, it is not a right which can be enforced at common law, but is to be worked out through the aid of the courts of equity, according to the rules and principles governing those courts, where the rights of all the parties interested can be considered and settled, or perhaps upon a petition under chapter one hundred and thirty-one of the Revised Statutes, relating to mortgages of real estate. *Cass* v. *Martin*, 6 N. H. Rep. 25.

At the date of the deed Woods and wife each had distinct rights in the land. The plaintiff had an inchoate right of dower in the premises, which, as against all persons but such as claim by or from herself, became perfect upon the death of her husband. The husband had the remaining interest in the premises. The interest of each in the land was encumbered by the act of each in the execution of the deed. Neither of the mortgagors could redeem as against the mortgagee, without the payment of the whole debt which the mortgage was intended to secure. *Cass* v. *Martin*, 6 N. H. Rep. 25; *Gibson* v. *Crehore*, 5 Pick. 146; *Robinson et al.* v. *Leavitt*, 7 N. H. Rep. 74; *Russell* v. *Austin*, 1 Paige, 192; 2 Powell on Mortgages, 689.

At present the plaintiff has a right of dower encumbered by the mortgage, and the defendant has the right in equity of the husband, and also holds the mortgage interest by purchase and assignment.

Can the widow be permitted to enjoy any interest in the premises, excepting upon the payment by her of the whole Farley mortgage debt to the defendant? Or may she entitle herself to be endowed of any part of the estate upon payment of her fair proportion of the debt according to her dower interest? The bill and answer show that the defendant set off to the plaintiff an interest in the premises less than one third part. But we are of the opinion that she was entitled, upon making her proper contribution, to a greater share or interest. Upon payment of her proper share of the debt she was entitled to be let in upon her dower in the same manner in which she would have been entitled if she had never encumbered the estate by the execution of the mortgage.

If we look at the exact relation of the several parties to the estate, we think the rights of each will be apparent. The defendant, in the first place, purchased the Farley mortgage, and it was assigned to him upon his paying the amount of it. He subsequently purchased the right which Aaron Woods had at his death to redeem the premises. After the purchase of the equity of redemption, as we conceive, he stood in the same position, and had the same rights which he would have had if he had first purchased the equity of redemption, and afterwards had paid the amount of the mortgage, or had taken an assignment of it. In either case he would be in equity and in law the purchaser and owner of the mortgage by way of redemption. The plaintiff also has the same rights in the estate that she would have had if the purchase of the equity had been made by the defendant, in the first instance, and the mortgage afterwards. She has an interest in the estate mortgaged, she having executed a mortgage deed only, and not an absolute deed to the mortgagee.

Having an interest in the premises, she has, like all other parties thus situated, a right to redeem. That is a universal principle.

What is she to do to entitle herself to redeem, or how is she to avail herself of her right to redeem?

The defendant, when he purchased, and so long as he held the mort-

gage interest only, of Farley, was entitled to receive of the plaintiff, or of any one holding the equity of redemption, the entire sum secured by the mortgage. There was no principle of law or equity that could conflict with that right. Upon no ground could the plaintiff, or any other one holding the equity of redemption, redeem, short of a payment of the entire sum secured by the mortgage. *Cass* v. *Martin; Robinson et al.* v. *Leavitt*, and *Rossiter* v. *Cossit*, before cited.

But when the defendant purchased the equity, she became entitled, as against him, to be endowed of one third part of the premises, upon contributing her just proportion of the mortgage debt, according to the value of her interest.

We think it would be idle to hold that the defendant was entitled to receive the whole amount of the mortgage before the complainant could be let in upon her dower estate; for if she should so pay the amount of the mortgage, she would clearly be entitled to the whole premises, until contribution should be made to her by the defendant. *Swaine* v. *Perine*, 5 Johns. Ch. Rep. 482; *Call* v. *Butman*, 7 Greenl. 102; *Robinson* v. *Leavitt*, *ubi supra*, and cases there cited. The estate of each in the land was liable for the whole mortgage debt. He could avail himself of the equity of redemption purchased by him at the administrator's sale in no other way than by contributing his fair proportion of the mortgage debt. *Taylor* v. *Bassett*, 3 N. H. Rep. 294.

Why, then, should she be driven to the idle ceremony of paying the whole mortgage, thereby giving the defendant the right to regain his interest in the premises by refunding to her his share? Such a course, we think, is not required, nor is it in accordance with well considered decisions in like cases.

Perhaps another view of the case may be taken, leading to the same result. The purchase of the interest of Aaron Woods in the estate, that is, of the equity of redemption, may well be considered as an extinguishment of so much of the mortgage debt as shall bear the same proportion to the whole debt secured by the mortgage, as the value of that interest in the premises bears to the whole interest of both the mortgagors — or the whole estate. Certainly that is an equitable view. It is the duty of a purchaser of an equity to redeem from the mortgage. If he holds the mortgage it should be considered as extinguished to that extent. To entitle herself, then, to be endowed, the complainant must pay the balance to the defendant, or offer to do it. This she did offer to do. And so upon paying the same into court after its amount shall be ascertained by an auditor or master appointed for the purpose, she will be entitled to have her dower set off to her in the premises.

Let a decree be entered accordingly.[1]

[1] Contra, *McCabe* v. *Bellows*, 7 Gray, 148 (1856).

PECKHAM *v.* HADWEN.

SUPREME COURT OF RHODE ISLAND. 1865.

[*Reported* 8 *R. I.* 160.]

THIS was an action in which the demandant claimed dower in a certain tract of land, containing about seven acres, situate in South Kingstown, of which, as alleged, her deceased husband, James P. Peckham, was seised at his decease. The questions raised by the pleadings were submitted to the court upon an agreed statement of facts, the more material of which were as follows, to wit: —

That said James P. Peckham, at his decease, was seised of the said tract of seven acres, and also of a farm lying near the said tract, containing about seventy acres, both of which he, on the 19th of July, 1861, mortgaged to the Wakefield Institution for Savings, to secure a note for $2,300, payable in two months from date, his wife, the demandant, uniting with him as joint grantor in the mortgage; that after the decease of said James P., the said farm was sold by his administrator at auction, upon a condition that the purchaser should assume upon himself and pay the said mortgage debt of $2,300, which he had done, and caused the said mortgage to be discharged in due form of law; that the said tract of seven acres (in which dower was claimed) was also sold at auction by said administrator, in different parcels, of all which the defendant became purchaser, receiving a conveyance thereof in one and the same deed; that the demandant had never parted with her dower in the said tract otherwise than in and by the said mortgage conveyance to the Wakefield Institution; that in one certain acre of the said seven, the widow of one Perry Peckham (father of the said James P., and from whom said James P. had derived title) now holds and enjoys her dower by assignment of commissioners in due form of law; and that, since the commencement of this suit, the defendant had, by deed, conveyed to one William P. Hadwen a part of the premises in which dower is demanded.

Upon this state of facts, the defendant moved that the court, in its decree for assignment of dower, instruct the commissioners as follows: —

1. Not to assign to the demandant any dower in that portion of the premises already assigned for dower to the widow of the father of the said James P.

2. To take into consideration the mortgage aforesaid, and to assign to the demandant dower according to the value of the equity of redemption only.

3. To assign to the demandant her dower in each separate tract, as the same was sold at auction by the administrator; or, to set off

her dower separately in that portion sold by defendant to William P. Hadwen.

E. R. Potter, for defendant, in support of the motion.

F. W. Miner, for demandant, *contra*.

Brayton, J. It is conceded that the first instruction asked is one proper to be given. Dower cannot be assigned out of that portion of an estate assigned to another woman in dower, and can only be assigned out of the remaining two-thirds. 1 Cruise, tit. Dower, p. 164.

It is quite clear that the second instruction asked is one which cannot properly be given. By the statement of facts, it appears that the three parcels of land out of which dower is now claimed, together with a fourth parcel in which dower is not now demanded, were, during the lifetime of the husband of the plaintiff, conveyed by him on mortgage to secure a debt of his, and that the plaintiff joined her husband in this deed, and thereby released her right of dower upon the same condition, viz., the payment of the debt, the conveyance to become absolute if the debt were not paid, and to become void if paid. The fourth estate was, after the death of the husband, sold for the payment of all his debts, by his administrator, under a license granted him for that purpose. In the discharge of his duty, to pay all the debts of the deceased, the administrator caused this debt, among others, to be paid out of the proceeds of the sale, under a condition of sale that the purchaser should so apply them. These were so applied, and the mortgage debt paid, and the mortgage thereupon discharged by the mortgagee.

Had this suit been against the original mortgagee, or any person holding under him by assignment, the widow would be estopped, by her release, from claiming dower in more than the equity of redemption. While the mortgage subsisted and until performance of the condition, it was a bar to more. But the mortgage has ceased to exist. It has become void by its own terms, as if it had never been, and with it the release, which has become void by the performance of the same condition. There is nothing, therefore, now subsisting, to bar the widow of her dower.

This precise point was decided in the case of *Matherson* v. *Smith*, 1 R. I. 22, and the wife held entitled to her dower. No authorities were cited in that case, but the reasoning of the court is abundantly supported by adjudged cases in point. One of these is the case of *Hitchcock* v. *Harrington*, 6 John. 290, where the mortgage was made by the husband to secure the purchase-money of the estate mortgaged. The mortgage was paid off by the purchase of the estate. Kent, delivering judgment, says the mortgage is paid. The purchaser holds under the title of the husband, and not under the mortgagee. He is in place of the heir, and he cannot set up a satisfied mortgage. The mortgage is for the benefit of the mortgagee only, and, until foreclosed, cannot be set up by anybody but by him, or his assigns. See also *Collins* v. *Irney*, 7 John. 278; *Barker* v. *Parker and others*, 17 Mass. 563, and the case cited by plaintiff.

It may be asked, what right has the heir to any of the estate of his ancestor without discharging his debt, and what pretence has he to complain of inequity that the widow, who is a mere surety for the debt of her husband, has been indemnified and saved harmless out of his estate, and his obligation to her has been thus discharged? She had a right to be thus relieved, while any estate of her husband remained sufficient for that purpose, though nothing remained to the heir.

The propriety of the third instruction asked is not apparent, considering the express language of the Statute upon the subject. Section 3 of chapter 202, Revised Statutes, page 503, provides that "where dower is legally demandable in more than one parcel of land belonging to the same person, such assignment need not be of a part of each lot or parcel, but may be together in one lot as the interest and convenience of the widow and the heir or person having the next immediate estate of freehold shall require."

Without any evidence that the interest or convenience of the parties requires what is here asked, we must leave it to the commissioners who are to view the estate, and will be able to judge what that interest or convenience may render necessary, and who can best do entire justice to the parties in this respect, to assess the dower in the mode they may judge best for the parties.[1]

McCABE *v.* SWAP.

McCABE *v.* BELLOWS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1867.

[*Reported* 14 *Allen*, 188.]

THE *first* of these cases was a writ of dower, to which the tenant pleaded that the demandant had released and conveyed away her dower, and that there was an outstanding mortgage upon the demanded premises which the demandant must redeem before dower could be decreed.

At the trial, before *Bigelow*, C. J., the title appeared to be as follows: —

1. A mortgage of the premises by Michael McCabe, the demandant's husband, to Stephen S. Seavy, dated September 16, 1846, to secure a promissory note. The demandant joined in this mortgage, to release dower. 2. Deed of quitclaim from Michael McCabe to Samuel M. Bellows, dated June 27, 1851, containing the following provisions: "Said premises are subject to a mortgage given by said McCabe to Stephen S. Seavy, bearing date September 15th, 1846, on which there is now due about the sum of four hundred and thirty dollars, which mortgage said Bellows assumes and agrees to pay as a

[1] See *Hastings* v. *Stevens*, 9 Fost. 564 (1854).

part of the consideration of this deed; and said Bellows agrees to pay the amount now due on said mortgage, and save said McCabe harmless by reason of the same." The demandant did not sign this deed. 3. Deed of quitclaim from said Bellows to Isabella Swap, the tenant, dated October 4th, 1851. 4. Assignment of the above-named mortgage by said Seavy to said Bellows, dated October 11th, 1851.

The demandant contended that the mortgage was extinguished; and, to meet this claim, the tenant offered certain testimony, which is sufficiently stated in the opinion, for the purpose of showing that the intention of Bellows and Michael McCabe was to keep the mortgage alive. The evidence was admitted *de bene*.

The *second* cause was a bill in equity to redeem the same premises from the mortgage, and is the same cause in which, at former stages thereof, decisions of this court are reported in 7 Gray, 148, and 1 Allen, 269.

These causes were reserved for the determination of the whole court, with the agreement that if the demandant should be found entitled to recover in her writ of dower, judgment should be entered therefor, and for damages to be determined by an assessor; and the bill in equity should be dismissed; otherwise, judgment for the tenant in the writ of dower, and such decree in the bill in equity as justice might require.

D. S. Richardson and *G. Stevens*, for the demandant.

W. P. Webster, for the tenant.

Wells, J. The tenant resists the claim of dower by setting up a mortgage in which the demandant released dower, and which was assigned to Bellows a few days after his deed to the tenant.

Assuming that the tenant, under her deed of quitclaim and release from Bellows, is entitled to avail herself of all his rights, although after acquired, the questions arise, 1st, Whether the writ of dower is barred by this mortgage title; if not, then 2dly, Whether the demandant is to have dower in the equity only, or in the whole estate.

The decisions since the adoption, in the Revised Statutes, of the provisions contained in the General Statutes, c. 90, § 2, establish these propositions: —

First. When a purchaser pays off a mortgage, to which the right of dower would be subject, merely to clear the estate of the encumbrance, and not by virtue of any obligation to pay the mortgage debt, and takes an assignment, or a conveyance of his interests from the mortgagee, he may stand on the mortgage title, if he please, and then no dower can be assigned without payment of the whole mortgage debt by the demandant. *Strong* v. *Converse*, 8 Allen, 557. *McCabe* v. *Bellows*, 7 Gray, 148.

Second. If, in such case, the mortgage be discharged, then he will be held to have redeemed, and the widow will take her dower in the equity, or by contribution, as she may elect, under Gen. Sts. c. 90, § 2. *Newton* v. *Cook*, 4 Gray, 46.

Third. But if the mortgage debt be paid by the debtor, or from his property, or in his behalf, then the payment will be treated as a satisfaction and discharge of the mortgage, and the widow will be remitted to her full right of dower. *Wedge* v. *Moore*, 6 Cush. 8.

Fourth. The payment will be held to be made in behalf of the debtor, when there is an obligation imposed by the grantor upon the purchaser to assume and pay the debt as his own; or when the grantor furnishes the means for the payment; as where, by the terms of the conveyance, the entire estate is sold, and the seller leaves a sufficient part of the purchase-money in the hands of the grantee for the purpose. *Brown* v. *Lapham*, 3 Cush. 551. In such cases, if the purchaser take an assignment of the mortgage to himself, he will not be allowed to set it up, but the legal title thus acquired will be held to merge in the equity. *Bolton* v. *Ballard*, 13 Mass. 227. *Snow* v. *Stevens*, 15 Mass. 278.

It is said that "mergers are odious in equity." *Gibson* v. *Crehore*, 3 Pick. 475–482. It is undoubtedly so whenever injustice will be worked thereby. But when a party, for the purpose of defeating a meritorious right in another, sets up, as a subsisting title, a mortgage which it was his duty to pay, equity is equally ready to manifest its aversion to such an attempt; and we think that both law and equity coincide in declaring against it. This we understand to be the real doctrine of the proposition in *Gibson* v. *Crehore*, which has since been repeatedly quoted and approved, viz., that an assignment "shall or shall not operate as an extinguishment of the mortgage, according as the interest of the party taking this assignment may be, and according to the real intent of the parties." It "does not so much depend upon the form of words used, as upon the relations subsisting between the parties." *Brown* v. *Lapham*, 3 Cush. 554. Accordingly an assignment in form is held to be an extinguishment, when the justice of the case requires it. *Wade* v. *Howard*, 6 Pick. 492.

In this case, the deed from McCabe to Bellows expressly stipulates that Bellows "assumes and agrees to pay" the mortgage "as a part of the consideration of this deed; and said Bellows agrees to pay the amount now due on said mortgage, and save said McCabe harmless by reason of the same." The acceptance of this deed made the amount due on the mortgage the debt of Bellows, which McCabe and his representatives could have compelled him to pay. *Pike* v. *Brown*, 7 Cush. 133. *Braman* v. *Dowse*, 12 Cush. 227. Bellows, by paying the mortgage debt according to his obligation, could have no interest nor intent, which the law would favor or recognize, to set it up against his grantor or any one standing upon his right.

The testimony of Hildreth, admitted *de bene*, shows an agreement between himself and Bellows, by which he was to advance the money to enable Bellows to procure an assignment of the mortgage to Hildreth, "to cut off this claim of dower." So far as this testimony was offered to prove an intent to preserve the mortgage title outstand-

ing against the demandant, it is incompetent, because, as already shown, the law will not permit Bellows to carry such an intent into effect. It cannot be allowed to contradict the writing, which shows an assignment to Bellows. And although it might establish a trust in Bellows, if he could hold the assignment as a valid title, it cannot do so against the countervailing equities, which require that it should be extinguished.

The testimony of Bellows is in some respects contradictory to that of Hildreth, in relation to the transaction of the purchase of the mortgage from Seavy; it is contradictory to his deed from McCabe in respect to the mortgage debt forming part of the consideration given for the land; and contradictory, one part with another, in itself; so that it is difficult to say what it does tend to prove. But it does not seem to raise any questions other than those already disposed of. It does tend to show, however, apparently, that in his purchase from McCabe, the encumbrance of the right of dower was allowed for in the consideration; so that it strengthens the equity of the conclusion to which we arrive, which is, that the demandant is entitled to recover her full dower in the premises. The case must accordingly be sent to an assessor to ascertain and report the amount to which she is entitled as damages for the detention thereof.

As a result of this conclusion the suit in equity, argued with this, *McCabe* v. *Bellows*, must be dismissed, as the plaintiff has her remedy at law.

CREECY *v.* PEARCE.

SUPREME COURT OF NORTH CAROLINA. 1873.

[*Reported* 69 *N. C.* 67.]

THIS was a petition for dower, first heard before the clerk of the Superior Court of Chowan County, and afterwards before his Honor, *Albertson*, J.

The facts of the case were shortly these: Augustus R. Creecy died in the county of Chowan in November, 1872, leaving the petitioner, his widow, and several children, who are defendants. In his lifetime he owned a tract of land, which he mortgaged to one John Roberts, for fifteen hundred dollars, which remained unpaid at the time of his death. The defendant, Pearce, administered on his estate and found it to be insolvent.

In her petition, the widow prayed to have the third part of the land exonerated, by having the mortgage debt paid out of the personal estate, and that part of the land not assigned to her for dower. The defendant, Hathaway, as a creditor, on behalf of himself and the other creditors, was made a party defendant and opposed the petition. The

clerk of the Superior Court gave judgment in favor of the petitioner, which was approved by the judge, and the defendant, Hathaway, prayed and obtained an appeal to the Supreme Court.

No counsel appeared in this court for the defendants.

Smith and *Strong*, for the plaintiff.

PEARSON, C. J. A widow as against the legatees or distributees has an equity for exoneration, that is, to have a debt of her husband, which is a charge upon the land, paid out of the personal estate, it being the primary fund for the payment of debts. So a widow as against the devisees or heirs has an equity for exoneration. *Carson* v. *Cowper*, 63 N. C. Rep. 386; *Smith* v. *Gilmer*, 64 N. C. Rep. 546.

In this case, the question is in regard to the right of the widow as against *creditors* of her husband. But for the mortgage on the land to secure the debt due to Roberts, the right of dower has priority over creditors in respect to the real estate. Suppose the widow relieves the land from this encumbrance, and takes an assignment of the Roberts debt, she then stands in his shoes, and has a right to have the land sold, and proceeds of sale applied for the exoneration of her right to dower. This is clear, and there is no difficulty in respect to the land.

When the widow, standing in her own shoes, or in the shoes of the creditor Roberts, insists that for her exoneration, the other creditors must give way, and let the debt of Roberts be first paid out of the personal estate, upon which neither she nor Roberts has any lien or priority, this court is unable to see any ground on which the claim can be supported. True, the personal estate is the primary fund for the payment of debts, but the defendant, Hathaway, and other creditors have the same right as against the personal estate as Roberts has; so the widow can take nothing by standing in his shoes, for his priority by force of the mortgage is only in respect to the land.

Dower is not subject to the debts of the husband, except debts charged on the land, but on what principle is it, that a debt, because charged upon the land, is also to have priority in respect to the personal estate? We can see none, and the able counsel of the plaintiff did not suggest any that needs further comment.

The judgment in the court below will be modified so as to direct a sale of the two-thirds of the land not embraced by the dower, and the reversion in the other third, the proceeds of sale to be applied to the Roberts debt, and the residue of the Roberts debt to be paid ratably out of the personal estate in the course of administration, and if there be still any part of the Roberts debt unsatisfied, it will be a charge on the dower land.

We considered the question whether in the distribution of the personal estate, the Roberts debt ought to be taken *pro rata* on the whole debt, or on the debt, minus the amount that may be realized out of the mortgage. We are satisfied the latter is the true principle, for if the whole debt draws a dividend, the other creditors would have a right of subrogation so as to have the benefit of the collateral security. So the

result would be the same; and we adopt the analogy in bankrupt cases where a creditor having collateral security is only allowed to prove the balance after exhausting the collateral security.

The decision will be modified accordingly, and the costs be paid out of the fund realized by a sale of the real estate.

This will be certified.

PER CURIAM. *Judgment accordingly.*

CAMPBELL *v.* CAMPBELL.

COURT OF CHANCERY OF NEW JERSEY. 1879.

[*Reported* 30 *N. J. Eq.* 415.]

BILL for dower. On final hearing on pleadings and proofs.

Messrs. Collins and *Corbin*, for complainant.

Mr. Wm. A. Lewis, for defendants.

THE CHANCELLOR. [HON. THEODORE RUNYON.] Neil Campbell died in 1877, intestate, leaving a widow, but no children. His heirs-at-law are his brothers and a sister. His widow files her bill for discovery, and to ascertain and establish her rights as to dower, and for the assignment of her dower accordingly, in certain real estate in this State, of which he died seised, or in which he had an interest. For a number of years prior to his death he was engaged in business, in partnership with Richard C. Washburn, under the firm name of Washburn & Campbell. The business of the firm is not yet completely settled. Mr. Campbell was, at his death, the owner of real estate which was his individual property, and he was interested, as a partner, in real estate which belonged to the firm of Washburn & Campbell. Of the real estate owned by him individually, some was free from mortgage, some was subject to mortgage which had been put upon it by him, and the rest was subject to mortgage which was upon it when he bought it, and subject to which it was conveyed to him, the amount of the mortgage being allowed to him as so much of the purchase-money of the property, and he having expressly, as between him and his grantor, assumed the payment thereof.

It is, of course, unnecessary to speak of the real estate owned by him individually which was not subject to any encumbrance. It is almost equally so with regard to that part of such real estate which is subject to mortgage put thereon by him. His personal estate is bound to exonerate that land from the burden of the mortgage. *Keen* v. *Mann*, 1 C. E. Gr. 398; *McLenahan* v. *McLenahan*, 3 C. E. Gr. 101.

As to that which was purchased by him subject to mortgage, the amount of which was allowed to him as so much of the purchase-money, and the payment whereof he assumed, his personal estate is not bound to exoneration. In such case, to make his personal estate

primarily liable, there must be clear evidence of an intention to make the mortgage debt his own. The weight of authority, both in this country and in England, is, that the personal estate is not primarily liable, unless the grantee has not merely made himself answerable for the payment of the mortgage, but has made the debt directly and absolutely his own, or has in some other way manifested an intention to throw the burden on the personalty. But the point under consideration was directly passed upon and decided in *McLenahan* v. *McLenahan*, *ubi sup.* There the amount of the mortgage had been allowed to the intestate as so much of the purchase-money. See, also, *Crowell* v. *Hospital of Saint Barnabas*, 12 C. E. Gr. 650, and *King* v. *Whiteley*, 1 Hoffm. Ch. 477.

The real estate of a partnership, purchased with partnership funds, or for the use of the firm, is subjected to the doctrine of equitable conversion, so far as necessary for the purposes of the partnership, but otherwise it retains its legal character and incidents. It is, in equity, chargeable with the debts of the copartnership; and any balance which may be due from one copartner to another, on the winding up of the affairs of the firm, and as between the heirs-at-law and the personal representatives of a deceased partner, his share of the surplus of that real estate remaining, after paying the debts and adjusting all the equitable claims of the different members of the firm as between themselves, is to be considered and treated as real estate. The widow of such deceased partner will be entitled to dower in his share of any real estate of the firm not required for the payment of such debts and the adjusting of such equitable claims. *Uhler* v. *Semple*, 5 C. E. Gr. 228; *Buchan* v. *Sumner*, 2 Barb. Ch. 165; *Shearer* v. *Shearer*, 108 Mass. 107; 1 Washb. on R. P. (4th ed.) 669; 1 Scribner on Dower, 536; *Foster's Appeal*, 74 Pa. St. 391.

SECTION VII.

ELECTION.

BIRMINGHAM *v.* KIRWAN.

CHANCERY IN IRELAND. 1805.

[*Reported* 2 *Sch. & L.* 444.]

NICHOLAS BIRMINGHAM, being seised of real estates in fee simple, and possessed of considerable personal estate, on the 25th day of October, 1793, made his last will, whereby he devised his personal property to trustees, upon trust out of the rents and profits, or by sale or mortgage thereof, to pay all such just debts of every kind, as he should happen

to owe upon his decease: and next, to raise a sum of £4000: of which sum he directed that £200 should be paid to his wife, Elizabeth Birmingham, and the remainder in various proportions to his sisters, and other persons. "And as to my demesne, containing about 170 acres or thereabouts, together with my house, offices, and gardens," the testator devised the same "on further trust to permit and suffer my beloved wife to hold and enjoy the same during her natural life, she paying yearly every year during her life 13*s.* for every acre contained in my said demesne, exclusive of bog; to keep the said house, offices, and garden in perfect repair; and not to set to any person, save such person as shall be in possession of the remainder." And as to all the residue of the said lands, subject to the payment of his debts and legacies as aforesaid, the same were devised to the use of John Birmingham for life, remainder to his son Nicholas Birmingham, his heirs and assigns. And as to all his personal estate (save his stock of cattle, household furniture, and plate, which he had previously bequeathed to his wife) the testator bequeathed the same to his executors, to be by them applied so far as the same would reach, in exoneration of his real estates, by applying the same to the payment, first of debts, and then of legacies.

The testator died on the 26th of November, 1793; and his widow afterwards intermarried with Richard Burke. This bill was filed in 1796 by James and John Birmingham against Mr. and Mrs. Burke, and against Kirwan and other *elegit* creditors, who had gotten possession of part of the estate devised: and on the 9th of December, 1799, a decree was made, whereby it was referred to the master, amongst other things, to take an account of the real and personal estate of Nicholas Birmingham, the testator, into whose hands the same came, and how disposed of; and also an account of his debts, legacies, and funeral expenses.

Thereupon the master, on the 22d day of July, 1803, reported, that the testator died seised of a fee simple estate of the clear yearly value of £800: and that upon his death, his house and demesne, containing 175 acres, came into the hands of Elizabeth Birmingham, by virtue of said devise, at the rent of 13*s.* during her life: and that the remainder of the lands had gone into the hands of the defendant Kirwan, and other *elegit* creditors. He further reported, that upon the 23d day of January, 1797, one-third part of said lands came into the hands of said Elizabeth, now the wife of Richard Burke, Esq., by virtue of a writ of dower; that the said Richard and Elizabeth then remained in possession thereof, and of the rents, issues, and profits thereof: and that the remaining two-thirds of said lands came into the hands of Nicholas Birmingham, the plaintiff, on or about the 13th day of December, 1799. And the master further reported a sum of £4545 as due for principal and interest on the footing of the several legacies in said will mentioned.

The cause now came on to be heard upon exceptions and merits. The third exception was, that the master had charged interest on the

several legacies bequeathed by the said N. Birmingham, although by the decree he was not warranted so to do: but the principal point that was argued was, whether the widow of the testator was entitled both to dower, and also to the provision made for her by the will.

Mr. Saurin and *Mr. Daniel*, for the plaintiff.

The *Solicitor-General*, *Mr. Kirwan*, and *Mr. Conmee*, for the defendant.

Lord Chancellor [Lord Redesdale] (after going through the exceptions, and observing on the third exception, that the practice here had always been for the master to compute interest on legacies, though the decree (contrary to the usual form in England) had not contained an express direction for the purpose: and therefore that the direction to take an account of the legacies must be understood in this country to include an account of interest) proceeded: —

In the discussion of this case it occurred as a matter of doubt, how far the will imposed a condition on Mrs. Burke with respect to her dower; whether she could claim under the will, and have her dower also. This question has been fully argued; all the cases which have occurred on the subject have been looked into with accuracy and attention; and the result of the consideration which I have given to the cases decided at law and in equity, is, that I conceive Mrs. Burke is not precluded of any demand of dower, except with respect to the demesne and house and garden, which is given to her with a certain degree of benefit, that is, at a rent which I presume to be considerably below the actual value. The will gives all the estates to trustees on certain trusts, the objects of which are, first to pay debts, and then legacies; applying first the general personal estate, whatever it might be. Notwithstanding that direction, and though it applies generally to every part of the testator's real property, the subsequent part of the will demonstrates that he did not mean that his house and demesne should be sold or mortgaged; for then his intention as to his wife could not take place; and therefore, unless absolutely necessary for the purpose of discharging the debts of the testator, it is clear that the house and demesne could not be sold during her life. Certainly they could not be sold to discharge the legacies; for that would defeat the intention of the testator in favor of his wife, and that intention appears as strong as his intention in favor of the legatees: and in the part of the will containing the devise to the wife, and to Mr. Birmingham, who now claims the fee, the testator appears clearly, by sufficient words, to have excluded his house and demesne from the immediate general disposition, except the rent to be reserved in the lease to his wife. If a sale had been necessary even for payment of debts, that sale must have been subject to the lease to the wife, if sufficient could have been so produced to pay the debts. The will, having given such direction with respect to the enjoyment of the house and demesne by the wife, devises the rest of the property to John Birmingham for life, remainder to Nicholas Birmingham, his son, in fee, expressly subject to the payment of the debts and

legacies aforesaid. This is a clear demonstration of the intent of the testator that the property so devised was the property which he intended should be specially subject to his debts and legacies: it is clear besides, from a general view of the will, that he meant to exempt the house and demesne, and that he had no idea that his other property would not be sufficient. I think therefore on the whole of the case, that the intention of the testator was to charge his debts and legacies on the rest of his property, exclusive of the house and demesne, so far as they were intended as a benefit to his wife, that is, subject to the lease in her favor: he meant that she should enjoy them during her life, paying a rent: after her death, that they should go with the rest of the property, as the rent would go during her life. This is not expressed in clear terms; but it is to be collected from the whole will, as the clear intention of the testator.

Then the question arises, whether Mrs. Burke can claim her dower out of the whole, and at the same time take this benefit under the will. It is insisted on one side, that the disposition made by the will demonstrates the intention of the testator to give her this benefit, in lieu and satisfaction of dower; and on the other, it is contended that whatever color former decisions on this subject may have given to this construction of the will, the latter decisions have run a different way; and that a widow was not to be deemed excluded from her claim of dower, merely by a bequest to her of part of the estate of which she was dowable, or of an interest arising out of the estate. The argument went very far on that subject; for the extent of it seemed to be that no bequest could be deemed in bar of dower, without express words; and that the widow ought not, in any case, without express words of exclusion, to be put to her election. I think that position cannot be sustained.

The general rule is, that a person cannot accept and reject the same instrument: and this is the foundation of the law of election, on which courts of equity, particularly, have grounded a variety of decisions, in cases both of deeds and of wills: though principally in cases of wills: because deeds, being generally matter of contract, the contract is not to be interpreted otherwise than as the consideration which is expressed requires: and voluntary deeds are generally prepared with greater deliberation, and more knowledge of pre-existing circumstances, than wills, which are often prepared with less care, and by persons uninformed of circumstances, and sometimes ignorant of the effect even of the language which they use. In wills, therefore, it is frequently necessary to consider the general purport of the disposition, in order to extract from it what is the intention of the testator. The rule of election, however, I take to be applicable to every species of instrument, whether deed or will, and to be a rule of law as well as of equity; and the principal reason why courts of equity are more frequently called upon to consider the subject (particularly as to wills) than courts of law, I apprehend is, that at law, in consequence of the forms of proceeding, the party cannot be put to elect: for in order to enable a court

of law to apply the principle, the party must either be deemed concluded, being bound by the nature of the instrument, or must have acted upon it in such a manner as to be deemed concluded by what he has done: that is, to have elected. This frequently throws the jurisdiction into equity, which can compel the party to make an election, and not leave it uncertain under what title he may take. Courts of equity also act with respect to infants in a manner in which courts of law cannot act. The modes of proceeding also in courts of law frequently throw these questions into courts of equity, especially where there may be a legal right to sue at law under one title, wholly independent of the other, which may be a title merely equitable.

The rule of election seems to me to apply to every species of right; and I cannot find that the right of dower is more protected than any other. There is no reason why it should: on the contrary, the Legislature has demonstrated its feelings on the subject, by the Statute which enables the barring dower by provisions before marriage: and this construction has been extended to infants marrying; and courts of equity have extended the bar to contracts made on behalf of infants without actual jointure, as in *Drury* v. *Drury*. But I apprehend there is no difference in principle in the decisions of the courts. The question has been decided in courts of law with respect to dower, wherever the form of the proceeding admitted of such decision. In 3 Leon. 273, where a provision in bar of dower was made for the wife after marriage, and consequently she was not bound to accept it; it was held that if the wife agreed to such a provision, by entry after the death of the husband, she might be barred in a writ of dower by plea *quod intrando agreavit;* that is, her election bound her, though the agreement did not. On the other hand, it has also been determined in a court of law, Cro. Eliz. 128, *Gosling* v. *Warburton* and another, that if the wife brings a writ of dower and recovers, she shall be barred of her right of entry for a rent-charge devised in lieu of dower, because it was against the intention of the will she should have both, and the acceptance of one is a waiver of the other. A court of law therefore will take notice of a provision made for a wife; and if made in bar of dower, and she should claim it after recovery in a writ of dower, the court of law will hold her barred by that proceeding from claiming the provision made in bar of the dower so recovered. In these cases the acts of the wife had declared her election; and having declared her election, and proceeded upon it in the one case by entry, and in the other by act on record, she was deemed by her own act to have put an end, in the first case to her claim of dower, in the other to her claim of the rent-charge given in bar of dower. However it is obvious that in a variety of instances the justice of such a case cannot be reached in a court of law, and the interference of a court of equity becomes therefore necessary.

The principle then that the wife cannot have both dower and what is given in lieu of dower, being acknowledged at law as well as in equity, the only question in such cases must be, whether the provision alleged

to have been given in satisfaction of dower, was so given, or not: if the provision results from contract, the question will be simply, whether that was part of the contract: but if the provision be voluntary, a pure gift, the intention must either be expressed in the form of the gift, or must be inferred from the terms of it. It is however to be collected from all the cases, that as the right to dower is in itself a clear legal right, an intent to exclude that right by voluntary gift, must be demonstrated either by express words, or by clear and manifest implication. If there be anything ambiguous or doubtful, if the court cannot say that it was clearly the intention to exclude, then the averment that the gift was made in lieu of dower cannot be supported; and to make a case of election, that is necessary, for a gift is to be taken as pure, until a condition appear. This I take to be the ground of all the decisions. *Hitchin* v. *Hitchin*, Prec. Chan. 133, proceeds clearly on this ground, and all the cases seem to have followed it; and the only question made in all the cases is, whether an intention not expressed by apt words, could be collected from the terms of the instrument. Cases of this description can be used only to assist the judgment of the court, in deciding what may be deemed sufficient manifestation of intention; and the result of all the cases of implied intention seems to be, that the instrument must contain some provision, inconsistent with the assertion of a right to demand a third of the lands, to be set out by metes and bounds, &c. That is the ground on which Lord Camden decided the case of *Villareal* v. *Lord Galway*, Ambl. 682: the case is not clearly reported, but my recollection of the manner in which it has always been treated is, that the claim of the annuity was considered as utterly inconsistent with the claim of dower; that the directions in the will with respect to the management of the whole estate, the payment of the annuity, and the accumulation during the minority of the child, were inconsistent with the setting out a third part of the estate by metes and bounds: and therefore Lord Camden thought the implication manifest, that the testator did intend the annuity as a provision in bar of dower.

Now, in the present case, it is clear that the assertion of a right of dower, as to the house and demesne, would be inconsistent with the dispositions of the house and demesne, contained in the will; and therefore Mrs. Burke cannot have both. The house and demesne are devised, with the rest of the estate, to trustees; that devise, taken simply, might be subject to the widow's right of dower; but it is coupled with a direction, that she shall have the enjoyment of the house and demesne, paying a rent of 13*s.* per acre, which must be out of the whole. Then follow directions that she shall keep the house and demesne in repair, that she shall not alien except to the persons in remainder; directions which apply to the whole of the house and demesne, and could not be considered obligations on a person claiming title by dower. It was clearly, therefore, the intention of the testator that the wife should enjoy the whole of the house and demesne, under a right created by the will; and not part of it, under a right which she had previously had,

and part under the will. If she brought a writ of dower against the trustees, as devisees in respect of the house and demesne, and was to have a third part set out to her, they could not execute the trust reposed in them, of permitting her to enjoy the whole under the will, one-third being recovered from them; nor could they reserve an acreable rent on the whole, and of the rent to be reserved she could not have dower: so that she, admitting the right of the trustees to the whole (which she must do for the purpose of having the demise made to her under the will), must yet dispute their title as to one-third, if she claims dower of the house and demesne. If she had entered on the whole of the house and demesne under a lease from the trustees, before suing her writ of dower, she must have demanded dower against her own title, and avoided the lease as to one-third. As to the house and demesne, therefore, the question seems clear.

Then comes the question, whether the implication extends to the rest of the estate? I cannot, on the whole of the case, think the testator has sufficiently manifested an intent that this beneficial interest in the house and demesne, given upon a reserved rent, and under certain conditions, should be considered as a bar of dower out of the rest of the estate: the will may be perfectly executed as to all other purposes, without injury to the claim of dower, with respect to the rent of the estate; it may be mortgaged or sold, subject to that claim. Certainly it would not sell for so large a sum of money as if the claim did not exist; but it is manifest that the testator had no conception of any deficiency, that he considered his property amply sufficient to answer all the purposes of his will. On the whole, therefore, I think there is not sufficient to exclude her from dower as to the rest of the estate.

NOTE. — The *dictum* in this case, that acceptance of a legacy given in lieu of dower is a *legal* bar to a writ of dower, was followed in *Kennedy* v. *Mills*, 13 Wend. 553 (1835), and *Davison* v. *Davison*, 3 Green, 235 (1836). *Quære tamen.*

The presumption that a legacy to a wife is in addition to, and not in lieu of dower, has been generally reversed in the several United States by Statute. See Stimson, Amer. Stat. Law, § 3244.

On the common law doctrine see 2 Scrib. Dow. *c.* 16, and on the right under the various Statutes to claim dower on land conveyed by the husband in his lifetime notwithstanding acceptance of a legacy, see *Id. ad finem.*

On election by an insane widow, see *Van Steenwyck* v. *Washburn*, 59 Wis. 483 (1844).

A legacy given in lieu of dower has precedence over other legacies. *Davenhill* v. *Fletcher*, Ambl. 244 (1754); *Towle* v. *Swasey*, 106 Mass. 100 (1870).

INTEREST OF WIDOW BEFORE ASSIGNMENT. She has no freehold, she cannot enter, and she has no interest which can be assigned at law or taken in execution; but in equity her interest can be assigned or taken for her debts. See 2 Scrib. Dow. *c.* 2.

AFTER ASSIGNMENT the widow is regarded as *in* by her husband, and as continuing his seisin, and not as taking her seisin from the heir; therefore a disseisee could enter into the land which had been assigned as dower to the widow of the disseisor, whereas before assignment he could not have entered, but would have been put to his action, inasmuch as the descent had tolled the entry. Lit. § 393. In like manner, if the heir died during the lifetime of the widow, then upon the widow's death the land which had been assigned to her went, not to his heir, but to the person who was then the

heir of the husband ; that is, although before assignment the heir be seised in fee, yet after the assignment he has not even a *possessio fratris*. So on assigning dower the heir cannot limit a remainder at the same time. The widow, however, holds of the heir. See 2 Scrib. Dow. *c.* 30.

After assignment the widow is entitled, against her husband's executor, to emblements, and yet on her death her executor is entitled to emblements against the heir. This latter right was confirmed by the St. of Merton (1235), *c.* 2. See 2 Inst. 80, 81. In other respects her rights and duties are like those of any other tenant for life. It has been doubted, however, whether a widow can enter for breach of a condition in a lease for years made by her husband, but it would seem that the St. of 32 Hen. VIII. *c.* 34, should be construed so as to include her. See 1 Roper, Husb. and W. (2d ed.) 425, Jacob's note.

Assignment. The widow is entitled to have a third of her husband's land assigned to her where that is possible ; and dower so assigned is said to be assigned according to common right. Such assignment may be by parol, may be made by an infant, and may be made by any tenant of the freehold, although he be in by wrong, if it be made to the widow really entitled. A widow to whom land has been so assigned, if evicted by a title paramount to her husband's, can claim to be re-endowed.

The widow, if of full age, can agree with the heir that dower shall be assigned to her in some other mode ; *e. g.*, a moiety or a quarter may be set off to her ; this is called an assignment against common right.

If such an assignment be of an estate in, or, like a rent, an interest out of land of which the widow is dowable, it is, though against common right, still an assignment of dower, as distinguished from a conveyance, and it may be made by parol ; and if accepted and enjoyed by the widow, it binds her, but if made by one wrongly in possession, it does not bind the true heir ; and *semble* an assignment against common right made by an heir while an infant does not bind him. See 2 Scrib. Dow. *c.* 4.

If a widow takes her dower by assignment against common right, and is evicted by paramount title, she is not entitled to be re-endowed in other land ; but this will not prevent her from claiming a life estate in one third of the land from which she has been evicted, as her dower at common law in that land. See 2 Scrib. Dow. *c.* 29.

Remedies. *At common law* the remedy was by a writ of dower *unde nihil habet*, or a writ of right of dower ; both were real actions : the former was used when no dower had been assigned, and the latter when part had been already assigned.

The remedy *in equity* took the place of the common law action in most cases in England. The jurisdiction in equity seems to be based upon the right to an account between persons together interested in land.

In the United States the remedies to recover dower are regulated by Statute.

In determining the value of land for the purpose of assigning or estimating dower, —

A. *As against the heir or devisee*, the value is taken as of the time of the assignment, *i. e.*, the heir is not allowed for his improvements. Co. Lit. 32 a. *Larrowe* v. *Beam*, 10 Ohio, 498, 507 (1841). See 2 Scrib. Dow. (2d ed.) 595–598.

B. *As against the husband's alienee* the same rule prevails in England, *Doe* d. *Riddell* v. *Grinnell*, 1 Q. B. 682 (1841). But in the United States the widow is not allowed to benefit from improvements made by her husband's alienee, *Powell* v. *Monson Manufacturing Co.*, 3 Mason, 347 (1824) ; she is, however, usually allowed to benefit from the increase of value caused by extrinsic circumstances, *Thompson* v. *Morrow*, 5 S. & R. 289 (1819). But see cases *contra* collected 2 Scrib. Dow. (2d ed.) 628–634. As to deterioration while in the hands of the husband's alienee, see Id. 634–636.

When property is indivisible, the widow is dowable of the rents and profits ; and sometimes by Statute, and often by agreement, a money payment is made to the widow in lieu of dower.

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